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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1677

DOROTHY B. LEE, *Petitioner*

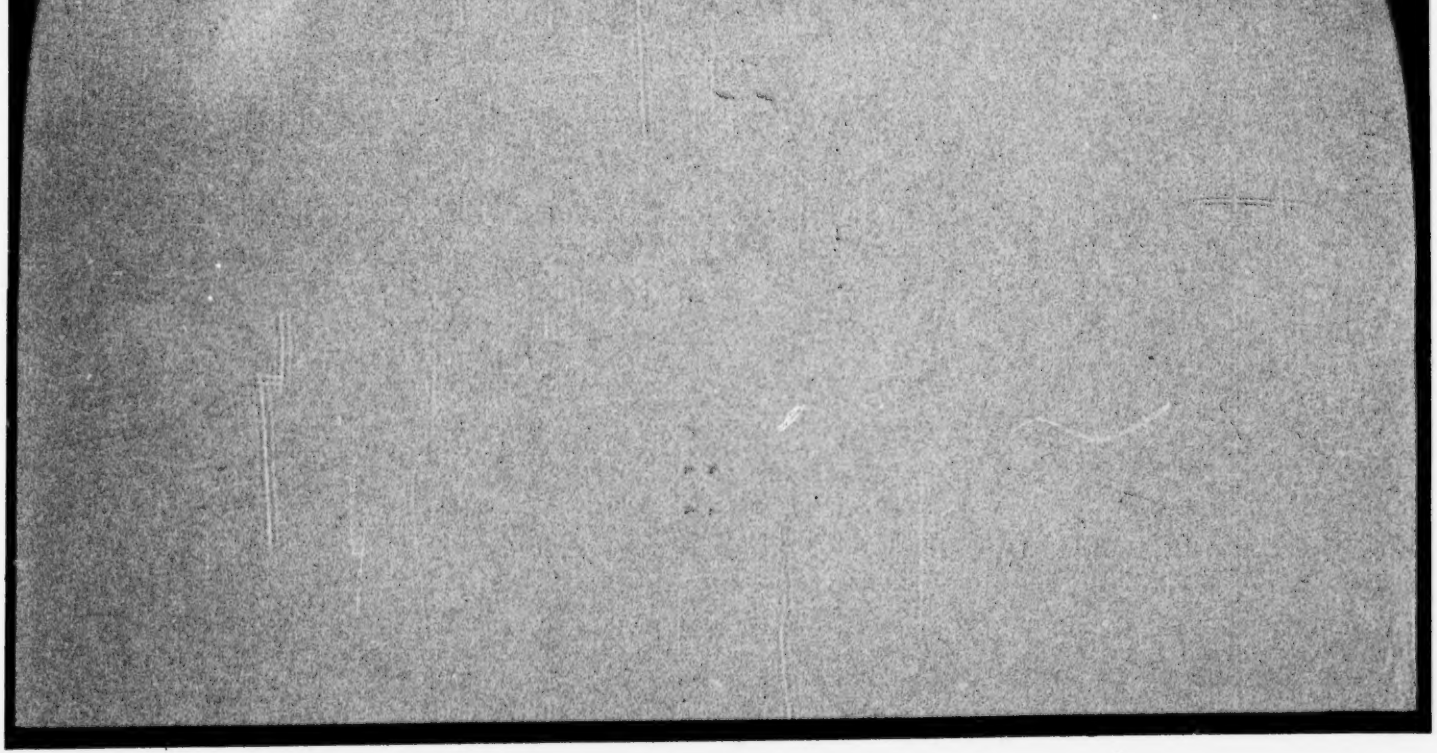
v.

RAY G. BROWN, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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Of Counsel



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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-1677

DOROTHY B. LEE, Petitioner,

v.

RAY G. BROWN, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF THE STATE OF OREGON

The Petitioner, Dorothy B. Lee, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Oregon entered in this proceeding on February 1, 1973.

OPINION BELOW

The opinion of the Supreme Court of Oregon is reported in 96 Advance Sheets, Oregon, 567, _____Or. _____, 505 P2d 924. A copy appears in Appendix "A". The denial of Petitioner's Petition for Rehearing is reported in 96 Advance Sheets (Or.) 4, _____Or _____, _____P2d_____ and a copy of the order is contained in Appendix "B".

JURISDICTION

The judgment of the Supreme Court of Oregon was entered on February 1, 1973. A Petition for Rehearing was timely filed and denied in an Order entered March 21, 1973.. This Petition for Certiorari was filed within ninety (90) days of that date. This

Court's jurisdiction is invoked under 28 USC, Sec. 1257 (3).

QUESTIONS PRESENTED

(A) As to actions of the trial (Circuit) Court:

(1) Whether the calling of a pre-trial conference on the very eve of trial, by telephone, without written order or delineation of issues, for the time of the trial itself, is a violation of the Due Process Clause of the Fourteenth Amendment. Whether Rule 6.00 (b) of the trial court rules is unconstitutional as void for vagueness and internally inconsistent.

(2) Whether Petitioner, by the trial judge's passing judgment on his own prejudice in denying a motion for change of venue, timely filed, is denied Due Process and Equal Protection under the Fourteenth Amendment. Whether Petitioner is entitled to a change of venue as a matter of right. Whether Petitioner is denied a fair trial in a fair milieu before an unbiased judge and subjected, along with her counsel, to judicial attainder, contrary to In re Murchison, 349 U. S. 133.

(3) Whether Petitioner is denied the right of jury trial in an action at law for malpractice against an attorney, guaranteed under Oregon state constitution, Article I, Section 17 (Appendix C) by the claimed conspiracy of the presiding judge and the judge assigned to trial, along with opposing counsel, all in violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment.

(4) Whether the introduction of the trial court's own self-serving assignment slip, as a Court exhibit, without opportunity to Petitioner's counsel to inspect, voir dire, or cross examine, is a denial of Petitioner's Due Process and Equal Protection rights under the Fourteenth Amendment.

(5) Whether the trial court's equivocation in re-

fusing to remove the "equitable defenses" of merger and estoppel from the issues, constitutes a denial of Due Process and Equal Protection under the Fourteenth Amendment.

(6) Whether the insertion into an ex parte, nunc pro tunc order and judgment of dismissal (See appendix L) of a ground not previously mentioned, cited, or discussed by the trial judge in an oral order from the bench, without notice to Petitioner's counsel or opportunity to be heard, although the trial judge apparently discussed the same with Respondent's Counsel (Appendix F), constitutes a denial of Petitioner's federal rights to Due Process and Equal Protection under the Fourteenth Amendment.

(B) As to Actions of the Supreme Court of Oregon:

(1) Whether the Supreme Court of Oregon violated Petitioner's Due Process and Equal Protection rights under the Fourteenth Amendment, by evading and refusing to consider Fourteenth Amendment Due Process and Equal Protection denials by the trial court (raised by Appellant in her Reply Brief) in inserting into an ex parte November 17, 1971 nunc pro tunc Order and Judgment of Dismissal, a ground for dismissal not previously mentioned, assigned, cited or discussed by the trial judge in an oral order from the bench, all without notice to Petitioner's counsel, or opportunity to be heard or object, although the trial judge apparently discussed the same with Respondent's counsel (Appendix F) in view of the fact that the Supreme Court of Oregon rested its decision that the Dismissal Order should be affirmed on the previously unassigned ground. Whether that evasion constitutes a denial of Due Process and Equal Protection in a calculated attempt to assign an "adequate state ground" to a decision to cut off Petitioner's right to have the same reviewed by this Court.

(2) Whether the Supreme Court of Oregon, in three times denying, without any reason stated, Petitioner's Motions (both ex-parte and adversary) for discovery and inspection of public court records in the Calendar Clerk's office of the trial court, and withheld by the trial court from the Petitioner, and directly bearing on the issues of possible collusion of the trial court and opposing counsel, constitutes a denial of Due Process and Equal Protection under the Fourteenth Amendment.

(3) Whether the actions of the Supreme Court of Oregon in refusing, in secret deliberations without opinion, to order the trial court to open public trial court records pertaining to Petitioner's cause, to Petitioner and her counsel, in a violation of Article I, Section 10 of the Oregon Constitution (Appendix C), constitutes a violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment.

(4) Whether the ruling of the Supreme Court of Oregon that the Petitioner "arbitrarily" refused to go to trial, is inconsistent with the court's own decisions in Roskop v. Trent, 250 Or 397, 443 P2d 174 (1968) and Mack Trucks v. Taylor, 227 Or 276, 362 P2d 364 (1961), relied upon, and a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

(5) Whether the Supreme Court of Oregon, in failing to meet any of Petitioner's claims of violation of Federal Constitutional rights, including the claim that as to Petitioner, Oregon Revised Statutes 14.110 and 14.120 are unconstitutional, denied Petitioners Due Process and Equal Protection rights under the Fourteenth Amendment.

STATUTORY PROVISIONS INVOLVED.

Oregon State Constitution:

Article I, Section 10 (Appendix C.)
Article I, Section 17. " "

Oregon Revised Statutes:
ORS 14.110 (Appendix D)
ORS 14.120 (Appendix D)
Rules of Court of the Fourth Judicial District, Multnomah County:
Rule 6.00 (Appendix E-1, E-2.)

STATEMENT OF THE CASE

Petitioner appealed to the Supreme Court of Oregon from an Order of Dismissal of the Circuit Court of Multnomah County, Oregon, Fourth Judicial District, for claimed failure to proceed with trial and failure of the trial court to grant a motion for change of venue, timely filed, before trial, under ORS 14.110 and 14.120. The trial court rested its dismissal on two Oregon statutes, ORS 18.230 and 18.260, at the time of its oral order from the bench on November 9, 1971. Without notice or opportunity to be heard to Petitioner's counsel, and in collaboration with Respondent's counsel, the trial court, on November 17, 1971, issued a written order nunc pro tunc November 9, 1971, stating that, in addition to ORS 18.230 and 18.260, the court rested its authority "under the court's common law power." The Supreme Court of Oregon in its February 1, 1973 opinion found that neither ORS 18.230 nor 18.260 were applicable. (See Appendix A, page 1a, infra.)

On oral argument of this cause before the Supreme Court of Oregon on September 11, 1972, Respondent's counsel made the admission that he collaborated secretly with the trial judge by telephone regarding this Order. (See Appendix F.) The trial judge previously, during the November 8 and 9, 1971 proceeding, had expressly stated to Petitioner's counsel, Cameron, that no conversations were to be had with the Court save in the presence of opposing counsel.

The facts, in sequence, are these:*

* For background of case see Appendix "G".

With her Complaint on June 15, 1970, Petitioner filed her Application for Jury Trial, as required by Rule 5.00 of the Rules of Multnomah County Circuit Court. Her complaint and amended complaint stated her cause of action at law for damages for malpractice against Respondent attorney for his claimed acts of tortious negligence in failing diligently to represent her in two causes: (1) a divorce suit and purported property settlement involving her former husband, attorney Jason D. Lee of Salem, Oregon,* and (2) an action at law for alienation of affections against the mother of Jason Lee, causing him to abandon her and seek divorce after 28 years of marriage. (See Lee v. Lee, 1 Or App. 115, 459 P2d 442).

Respondent filed his Third Amended Answer on October 7, 1971. His second and third amended answers claimed purported equitable defenses of "merger" and "estoppel" as follows:

"....that all of the claims set forth by /Petitioner/ in her Amended Complaint....which she had or claimed to have had against Jason D. Lee and Myrtle E. Lee /his mother/ and which she claims were negligently handled by /Respondent/ were merged into and became a part of the settlement agreement." Respondent further alleged that those claims were "fixed and judicially determined by reason of said stipulated settlement, decree and judgment, which thereafter became final," and that Petitioner was "estopped" by the decree from asserting any claims against Respondent.

The presiding judge, William Dale, on October 1, 1971, denied Petitioner's motions to strike the claimed equitable defenses and an alternative demurrer. Petitioner then filed motions for reconsideration of the

*This decree and settlement is under attack as void for failure to serve the district attorney with summons (which is a fatal jurisdictional defect under Oregon case law) and for fraud, in a separate suit filed in October, 1971.

motions to strike and alternative demurrer, citing additional and recent authorities. Arguments on the latter were held on November 1, 1971 and were overruled November 3, 1971 by Judge Dale, in the face of a similar malpractice case where similar defenses were made, cited to Judge Dale, and in which he had been reversed by the Supreme Court of Oregon. (See King v. Jones, 258 Or. 468, 483 P2d 468).

In August, 1971, the case had been set for trial on November 8, 1971 with Judge Dale's announcement in a letter that the case would be tried on that date or he would dismiss it. Judge Dale was reminded on November 1, 1971, at argument, that the parties were not at issue. Petitioner filed her Reply on November 1, 1971, under extreme pressure from Respondent's counsel and the pressure of the impending trial date. Respondent's counsel had filed a demurrer and motion for judgment on the pleadings, and these had been neither argued nor ruled upon.

For 30 days prior to November 8, 1971, Petitioner's counsel had made full preparation for trial, including the subpoenaing of some 12 witnesses, including two judges, and Petitioner's daughter from Rochester, New York, whose round trip fare was advanced in order for her to appear as a witness.

On Friday, November 5, 1971 at 4:00 P. M. Petitioner's counsel, Heffron, was called on the telephone by trial judge, John C. Beatty, to whom the cause had that day been assigned. She was advised by him that the case had been assigned as a non-jury trial and that he would hold a pre-trial conference on November 8, 1971 at 9:00 A. M.

Judge Beatty indicated to counsel, Heffron, that he did not know whether there would be time to "hammer" out a pre-trial order by the re-scheduled time for trial, November 8, 1971, at 2:00 P.M. At 8:05 A.M. on Monday, November 8, 1971, both counsel

Cameron and Heffron delivered to the clerk of the trial court a motion for preservation of jury trial, along with a motion for change of venue, supported by affidavits claiming prejudice of Presiding Judge Dale, Judge Beatty and the entire Multnomah County bench against Petitioner and her cause, so that it would be impossible for her to have a fair trial in Multnomah County. Both documents were delivered by Petitioner's counsel, Cameron, into the hands of Judge Beatty's secretary at 8:30 A.M. on November 8, 1971.

At 9:30 A.M. on that day, Judge Beatty convened court and summarily forthwith and in high indignation passed on his own prejudice and denied the motion for change of venue. Hostility mounted in intensity to the end of the proceeding, with the sole object of bending the will of Petitioner and her counsel to that of the trial judge and opposing counsel. On the morning of November 9, 1971, in a build-up of increasing full court press and apparent pre-judgment (Tr 54, lines 1 & 2) Judge Beatty dismissed the cause, refusing to give Petitioner's counsel opportunity to be heard or to allow any type of objections or exceptions to be entered into the record. Full and detailed federal and state constitutional objections (except for objections later raised on the pre-trial procedure and the denial of access to court records--not then evident) were entered into the record in writing on December 8, 1971, by Petitioner's counsel, prior to filing of Notice of Appeal to the Supreme Court of Oregon. (See AppendixH)

During the day of November 8, and again on the 9th, and based on the contents and beliefs asserted in the motion for change of venue, Petitioner's counsel resolutely, but courteously, held their ground, asserting that any participation in a pre-trial conference or any other proceedings would constitute a waiver of Petitioner's absolute right to a change of venue under ORS 14.110 and 14.120 and the case law thereunder,

particularly the Mack Trucks case, (Mack Trucks v. Taylor, 227 Or 376, 362 P2d 364) and Roskop v. Trent (250 Or. 397, 443 P2d 174).

During the entire day of November 8, 1971, except for the noon recess, Petitioner's counsel were held within the Court House at Portland by order of Judge Beatty, nor was reasonable time allowed during the noon hour for both Petitioner's counsel to proceed to Salem--a distance of 45 miles--to file an original Petition for Writ of Mandamus, which was served that day upon Judge Beatty and Judge Dale. The trip to and from the Supreme Court, through the noon traffic in Salem, would have taken no less than 2½ hours. Petitioner had made it clear to her counsel that she wished to have both counsel present during all court proceedings, in view of the numerous constitutional considerations involved. Counsel were held in Portland until after closing hours of the Supreme Court of Oregon.

At the earliest opportunity, prior to 8:30 A.M. on the morning of November 9, 1971, Petitioner's counsel filed the original Petition for Writ of Mandamus in the office of the Clerk of the Supreme Court in Salem. Judge Beatty reconvened his proceeding at 9:30 A.M. in Portland. He announced his "Opinion and Rulings on the Questions Raised" (Tr.56 et seq.) and in rapid fire order, after announcing his position on the motion for change of venue, and the affidavits, entered, as Court's "Exhibit 6" what purported to be the "assignment slip"of the trial made by the calendar clerk of the court.

Later, while the matter was on appeal, Petitioner's counsel, investigating the matter of assignment of this cause, with the calendar clerk in Portland, found that this "assignment slip" was not in the handwriting of the calendar clerk, but was, apparently in the handwriting of Judge Beatty's secretary-clerk, including the labelling of it as a non-jury trial, not on the ordi-

narily used form used by the calendar clerk. Judge Beatty did not afford Petitioner's counsel opportunity to be heard, to examine or voir dire as to the source of Exhibit 6. Throughout the two days of the proceeding, it was made increasingly difficult, and, indeed, impossible for Petitioner's counsel, either Mr. Cameron or Mrs. Heffron, to assert various objections or rights of Petitioner. At numerous times during the hearings, Mr. Cameron was cut off summarily by the bench.

Following the introduction of "Court Exhibit 6", Judge Beatty swiftly, with Respondent's counsel supplying, at Judge Beatty's suggestion, such papers and authority as both deemed necessary for an Order of Dismissal, dismissed the case orally, assigning as grounds ORS 18.230 and 18.260. At Tr 54, Judge Beatty announced that the dismissal would be with prejudice.

Petitioner, in her brief to the Supreme Court of Oregon, devoted considerable attention and space to what she claimed to be wholesale judicial attainder wrought by the trial court and opposing counsel in the trial court. Not one of these claims of Petitioner was answered in Respondent's brief, nor discussed by Respondent in oral argument before the Supreme Court of Oregon. Petitioner repeatedly asserted at both trial and appellate stages federal constitutional rights (See Appendix I) but none of the federal constitutional rights asserted by Petitioner were treated in any way by the Supreme Court of Oregon. The claimed prejudicial action of both Judges Dale and Beatty are shown in graphic detail on pages 75 through 77 of Petitioner's Brief in that court, now before this Court. The epitome of prejudice was reached on October 1, 1971 by Judge Dale, when he said (See appendix J): "I'm not going to try this case.

> I wouldn't want to try this case. I don't know of any judge who would want to try this case!"

The Respondent is an attorney who has practiced for a long period of time before the very court before which this case was scheduled for trial and appeared, along with his counsel, to be on noticeably affable and ingratiating terms of friendship with the trial court and the entire staff during the proceedings. Such was in striking contrast to the frigid attitude of the trial court personnel and the military-like, autocratic mien and attitude of the trial judge toward Petitioner and her counsel shown inside and outside of the Transcript of Proceedings on November 8 and 9, 1971.

REASONS FOR GRANTING THE WRIT

1. The purported independent state grounds relied on in the opinion of the Supreme Court of Oregon are inadequate and war with the facts.

(a) The change of venue issue:

The Supreme Court of Oregon in its opinion in Appendix A said:

> "The trial court denied the motion for change of venue. It should be noted that the motion and the affidavits supporting the same do not state that Judge Beatty or the inhabitants of the county are prejudiced against the plaintiff, but, rather, state that Judge Dale was prejudiced against her."

The following facts appear clearly in the Record:

(1) Petitioner, in her affidavit supporting the motion for change of venue, stated, lines 5 and 6, page 2 (See Appendix K):

> "....that Judge Dale....had assigned the case to Judge Beatty for trial with-

out a jury."

and at lines 21-26:

" That the calling of a pre-trial conference at the last hour before trial is calculated and prejudicial. It gives no reasonable time to prepare papers for same, or proper consideration and reflection. That such calling is a denial of due process and the right to a fair and complete trial, with absence of judicial compulsion and attainder and in an atmosphere of judicial calm, not prejudice."

(2) In the motion for change of venue, Petitioner, at page 1, lines 20-25, specifically mentions that Judge Dale has selected Judge Beatty to try the case and that he has conveyed his personal instructions to Judge Beatty. Judge Beatty, as the judge named to try the cause, is specifically mentioned.

(3) That in Petitioner's affidavit, page 3, lines 4 through 7, she specifically mentions Judge Beatty.

(4) Petitioner's counsel, Heffron, in her affidavit, page 4, lines 21-27, states that "No Multnomah County judge can be fair in this case, and that prejudice against the Plaintiff and her cause and interests permeates the entire Multnomah County Circuit Court."

(5) The Petition for Alternative Writ of Mandamus which was filed in and is part of the record of this cause, prepared at the same time as the motion for change of venue, is specifically directed against both Judge Dale and Judge Beatty.

(6) Judge Dale was named in the motion for change of venue because he had heard the case prior to the date set for trial and because of his influence as presiding judge and his supervisory capacity over his fellow judges. Both the motion for change of venue and the Peti-

tion for Alternative Writ of Mandamus were directed at both judges.

(b) The jury trial issue:

The Oregon Supreme Court, at the end of its opinion, in Appendix A, states:

> "The Plaintiff also contends that the trial court erred in failing to acknowledge plaintiff's right to a jury trial. There is no substance to this assignment of error. The record shows that the trial judge on three occasions, advised the plaintiff that she would have a jury trial on the facts."

A close reading of the Transcript reveals that in every instance wherein Judge Beatty discussed jury trial, he hedged his statements with conditions. Every statement of Judge Beatty as to jury trial was equivocal. The conclusion of the Supreme Court of Oregon on the facts is clearly contrary to the record. Petitioner's counsel Cameron squarely put the jury trial issue to Judge Beatty at Tr. 10:

> "Mr. Cameron: Is it your position then, your ruling officially, that this case is entitled to a jury trial?
>
> The Court /Judge Beatty/: I think that the questions of fact in this case--it seems to me insofar as there are questions of fact, when all the questions of law are decided, should be tried to a jury if a jury is requested."

This Court has consistently been solicitous to protect the right to jury trial. No litigant should be deprived of his right to a jury determination. Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 510, Beacon Theatres v. Westover, 359 U.S. 500, 501, Dimick v. Schiedt, 293 U.S. 474, 486.

"Any seeming curtailment of the right to jury trial should be scrutinized with the utmost care." ---Dimick v. Schiedt, supra.

But, assuming, arguendo, that the right to jury trial was acknowledged unconditionally, yet such would have been a total empty shell, in view of Petitioner's claims that the entire judicial proceedings are saturated with bias and prejudice, depriving her of the likelihood of fairness of trial, under Murchison, 349 U.S. 133, which is the law of the land. It is also the law of the land that Due Process requires a trial before an impartial judge in the first instance, or, in a jury trial, before a jury presided over by an impartial judge, as exemplified in Williams v. Brannen, 178 S.E. 67, at 69. (W.Va., 1935.)

Federal questions dealing with important rights of Petitioner were necessary to a proper determination of this cause and were properly presented. (See Appendix I and Index to Petitioner's Brief in the Supreme Court of Oregon.) The purported state grounds which the Supreme Court of Oregon asserts, are totally inadequate and mere screens to block out Petitioner from this Court. Fragile and straw state grounds have no place in the vindication of federal rights so long as this Court sits. The judgment of the Supreme Court of Oregon is eminently ambiguous. Even if Petitioner chose to start again, there would still be the dubious threat of injustice in the same trial court, with the spurious equitable defenses no more settled now than they were by the decision of the supreme court. The non-federal grounds of the supreme court are not tenable. They are arbitrary and, it is submitted, they are a device to prevent a review of the decision by this Court. This Court may apply its own standard in making its inquiry. Eustis v. Bolles, 150 U.S. 361, 370, Enterprise Irrigation District v. Farmers' Mutual

Canal Co., 243 U.S. 157, 164. The action of the Supreme Court of Oregon not only discriminates against raising federal claims, but stifles them. The vindication of Petitioner's federal rights have been totally evaded. Such is a denial of Due Process and Equal Protection under the Fourteenth Amendment. Rogers v. Alabama, 192 U.S. 226, 230-231.

2. Judicial attainder worked at both the trial and appellate levels in the Oregon courts warrants a consideration of the merits.

Judicial attainder is the stigmatizing and pre-judgment of a cause because the person, cause, or both, are unpopular. It goes beyond mere personal bias of a judge and permeates the entire court, its personnel and atmosphere. It arises in this case because Petitioner sued a member of the bar of the trial court.

The cases and articles across the land indicate that it is that taint of bias, prejudicing the rights relating to life, liberty and property and manifested in hostility, plain, open, or subtle, of a judge or judges and those within the curtilage of the court. It shows in the atmosphere, surroundings, bearing, facial expression(s), tone, inflection, and frequently does not appear in the written record. The court may not allow counsel to show same. It is inimical of the constitutional right to a fair trial in a fair milieu before an unbiased judge, as well as other basic rights under the Due Process and Equal Protection clauses.

Constitutional rights may not be denied merely because of hostility to their assertion or exercise. The claimed acts of hostility of Judge Dale of the lower court are set forth on page 75 of Petitioner's Brief in the Oregon Supreme Court. The long catalogue of claimed prejudicial actions of Judge Beatty and his court are likewise set forth on pages 75-76. Multitudinous Transcript references are given in the Petitioner

Brief in the Supreme Court of Oregon at page 77.

These long catalogues of judicial abuses add up to three things: judicial usurpation, judicial oppression and judicial prejudice with a heavy hand and harsh tongue.

The record and transcript are clear that Petitioner did not have a fighting chance. She was literally locked out of the circuit court and blocked out of the Supreme Court of Oregon.

What were the abuses of the Supreme Court of Oregon?

(1) A denial of discovery of material in the public records in the Calendar Clerk's office of Multnomah County, three times.

The full facts as to the changing of the cause from jury to court trial in the records of the Calendar Clerk's office of the trial court are not known to counsel, but were sought in March of 1972. A master file card which the Calendar Clerk did show Mr. Cameron revealed that a space was provided for "court or jury" trial; the word "JURY" had been filled in, but then had been crossed out and replaced by the handwritten notation, "Ct", meaning court trial. It is Petitioner's position that she is entitled to see all of the Calendar Clerk's records on this matter as bearing on possible conspiracy of the trial court, its personnel and Respondent's counsel, to deprive Petitioner of her right to jury trial under the Fourteenth Amendment.

(2) Article I, Section 10 of the Oregon State Constitution provides that

"No Court shall be secret...."

The apparent trafficking of Judge Beatty with Respondent's counsel, Sidman, without the knowledge or presence of Petitioner's counsel when Judge Beatty

was in doubt as to how to frame his Order of Dismissal, and which Mr. Sidman openly admitted in argument before the Supreme Court of Oregon on September 11, 1972, was the subject of discussion, is a bald effront to this constitutional guarantee.

It is further submitted that it was improper for Mr. Justice Bryson of the Oregon Supreme Court to sit on this case, let alone write the opinion, when the Rules of the Multnomah County Circuit Court, made a part of this Record (See Exhibit E-2)show that he was one of the authors of the Rules, including Rule 6.00 on pre-trial, which Petitioner claims to be unconstitutional. (See Appendix E-1.) Mr. Justice Bryson, moreover, would have from the standpoint of pride of authorship, every interest in upholding his own handiwork. Additionally, he sat and heard the Respondent in argument in a related case--the alienations case--which is one of the very cases in controversy in the malpractice case at bar, and made an Order therein which bears his signature. (See Appendix N). Such participation denied Petitioner of Due Process and Equal Protection under the Fourteenth Amendment.

(3) The Supreme Court of Oregon showed a biased inconsistency and a denial of federal Due Process in ruling in its opinion that Petitioner's standing her ground and refusing to proceed, in order, under the cases of Oregon, towit: Mack Trucks, Inc. v. Taylor, 227 Or 376, 362 P2d 364 and Roskop v. Trent, 250 Or. 397, 443 P2d 174 (1968), to avoid a waiver of her objections to the venue, in then holding in its opinion that Petitioner was "arbitrary" in refusing to proceed into the pre-trial and trial, the supreme court having found that the motion for change of venue was timely filed.

(4) The Mandamus requirements set forth in Rule 5.60 of the Rules of the Supreme Court of Oregon

(See Appendix O) and the practice of usually taking five days to rule on a petition for an alternative writ of mandamus, render the procedure a vain and idle gesture in practice in venue matters and offend both the Due Process and Equal Protection guarantees of the Fourteenth Amendment as to this Petitioner.

What were the abuses of the trial court in Oregon?

Petitioner's Brief in the Supreme Court of Oregon, at pp 75-76, lists a virtual alphabet of wrongs. These are salient:

(1) denial of jury trial, discussed supra;

(2) denial of the right to change of venue and the right to a fair trial in a fair milieu before an impartial judge, under Murchison, supra.

The motion for change of venue and the affidavits supporting same were not contested by Respondent, nor were counter-affidavits offered at any time. Under such circumstances under the law of Oregon, the asserted truths stand. Rugenstein v. Ottenheimer, 78 Or 371, 52 Pac 215.

ORS 14.110 and 14.120 are unconstitutional under Amendment Fourteen, insofar as they permit a judge to pass on his own prejudice, as Judge Beatty did in the case at bar, (Tr. 64, lines 5 and 6) when he said:

" I most assuredly have no prejudice against the plaintiff, nor in favor of the defendant."

This has been an unbroken legal precept from the early time of the Romans that no man shall be a judge in his own cause. The Oregon Supreme Court expressly recognized this in U'Ren v. Bagley, 118 Or 77, at 80, 245 Pac 1074. Once Judge Beatty's impartiality was challenged, the right to change of venue became absolute.

In ruling that he had discretion to deny a change of venue, Judge Beatty apparently relied upon the cases

cited in the 1953 Annotations to ORS 14.110 and 14.120, which antedate In Re Murchison, supra, which came after the 1953 annotation. Murchison is the law of the land under Article VI of the federal constitution, and has become the most important instrument for the guarantee for a fair trial in a fair tribunal before an unbiased judge in not only federal courts, but in state courts, as well, under the Fourteenth Amendment. See Groppi v. Wisconsin, 400 U.S. 505, which, in fact, brings Murchison down to date. Judge Beatty's unequivocal duty then and there upon the motion and noncontravention of it by the Respondent, to order a change of venue under ORS 14.120, the last sentence of which is mandatory, and is cast in the word, "shall," becomes absolute. Insofar as ORS 14.120 denies Petitioner her absolute right to change of venue, it is, as to her unconstitutional under the Fourteenth Amendment Due Process and Equal Protection provisions. ORS 14.110 is, likewise, unconstitutional in denying Petitioner Due Process and Equal Protection under the Fourteenth Amendment in permitting a judge, whose prejudice is not contested or contravened by the Respondent, to sit in judgment on his own prejudice.

(3) Equivocation as to Equitable Defenses.

Intimately connected with Petitioner's right to jury trial is the injection into the cause by Respondent of the so-called "equitable defenses" of "merger" and "estoppel." Respondent claimed that when Petitioner made a property settlement with Jason Lee on May 27, 1969, and the property settlement was entered into the record, that any cause which Petitioner had against Respondent for negligence and wrong doing in handling her representation in the divorce and the alienations case, were "merged" in and became a part of the property settlement and that she is now "estopped" to claim, as against him, that she was

damaged by any wrongdoing of him...a novel idea which would, almost universally, excuse attorneys from their negligence and wrong doing.

Petitioner contends that the injection of such claimed "equitable defenses" was a calculated ruse to deprive her of her constitutional right to jury trial and that these defenses have no substance in law or fact. Repeated efforts were made in the lower court to have them removed. Their presence was the very pivotal factor that left her case "up in the air" and jeopardized her right to jury trial; each offer of jury trial by Judge Beatty was hedged with the condition that if, after pre-trial conference, and if, after the court had considered the "equitable defenses", the Petitioner still had a fact question, she could have a jury trial. As part of Petitioner's Due Process and Equal Protection rights under the Fourteenth Amendment she was entitled to have these matters ruled upon by the Supreme Court of Oregon, in view of the fact that they were and are pivotal. They are pure legal questions and should not have been in the case at the time the cause came to trial.

(4) The last-minute pre-trial conference call, and the unconstitutionality of Rule 6.00 of the trial court, are internally at odds, uncertain, unmeaning, and void for vagueness.

In Petitioner's Brief before the Supreme Court of Oregon, Assignment of Error No. 2, Petitioner asserted that the eleventh hour pre-trial call of Judge Beatty of the lower court lacked Due Process, constituted surprise and advocacy for Respondent. Rule 6.00 of the Multnomah court rules, covering pre-trial conferences (Appendix E-1) is modelled literally verbatim on Federal Rule 16. Petitioner in her Brief carefully showed that, under interpretations of the federal rules, not only should adequate time be given before a pre-trial conference, but that notice

should be given in writing and issues delineated by the court. The practice, depending upon conditions, runs from one to two weeks or more. The authorities are carefully reviewed on pages 21-26 of the Brief. Counsel Cameron for Petitioner, squarely entered upon the record Petitioner's objections to Judge Beatty' swift and sudden one-minute-before-trial approach, and stated to Judge Beatty at Tr 11, lines 4-10, that ample or due opportunity for the gathering of pre-trial material was not afforded in this instance.

Further, attention is called to Rule 6.00 of the Multnomah County Circuit Court rules, which are included in the record before this Court, and a copy of which rule is included in Appendix E-1. Federal Rule 16 begins, "In any action....". Subsection (6) of Federal Rule 16 reads, "..such other matters as may aid in the disposition of the action." It thus appears that the federal rule is framed to include "actions."

The Multnomah rule 6.00 begins, "In any proceeding..." but in subsection (g) reads "...such other matters as may aid in the disposition of the action..." Apparently the framers of the Multnomah Circuit Court rules (of which court, in 1965, Mr. Justice Bryson, the writer of the Oregon Supreme Court opinion, was one of the members) sought to extend the pre-trial procedure to "proceedings"--a broader word than "actions"--but then, in subsection (g) used the word "action." Such confusion makes the rule and its application internally conflicting and void for vagueness and uncertainty.

To the knowledge of Petitioner's counsel, this Court has not spoken on the application of Due Process principles of timely notice, reasonable delineation of issues to be considered, and ample or sufficient opportunity to prepare, in the matter of state court pre-trial procedures. Here involved is a rule of court of Multnomah County, Oregon, which confuses the words "action" and "proceeding." There are no statutory

provisions in the Oregon Revised Statutes for pre-trial conferences. With swift and rising numbers of pre-trial procedures now being used in many state courts, this Court's clear enunciation and affirmation of Due Process principles would be salutory, indeed, mandatory, and prevent abuses such as the last-minute call of Judge Beatty in the trial court at bar.

3. This case raises significant and recurring problems of nationwide significance.

(a) The present trend toward large, multi-judge benches in fast growing urban centers, and the communion of judges through professional judges' organizations, bar associations and socially, renders it even more important that the signal dangers of judicial attainder be recognized. Judges no longer ride the circuit and hold court alone as rugged individuals. The swift advent of urban concentrations renders large congregations of judges the usual thing. The possibilities and probabilities of the influence of a presiding judge are not to be minimized. Honolulu Roofing Co. v. Felix, 426 P2d 293 (Hawaii, 1967).

The aims and ideals of justice require that an antiseptic atmosphere of court be maintained. Here Petitioner's plight is unquestionably the plight of many litigants, who, unfamiliar with the panoply of their federal constitutional rights, choose not to exert them through ignorance themselves or of their counsel, through fear, or economic necessity, and thus go down to defeat. Petitioner, already having been put deep in her end-zone through a thoroughly unfair procedure of Respondent, especially in a baseless and arbitrary claim and unwarranted procedure for a lien, in Lee v. Lee, Brown, 5 Or App 74, 482 P2d 745 (1971), is out of pocket some $15,000 for Respondent's stubborn determination to carry through a wrong procedure. The basic rudiments of Due Process were lacking in that case, as they were and are in the case at bar.

(b) Any cause wherein there is a serious hindrance to the effective and just administration of the laws and which may be recurring in other courts throughout the land, is deserving of the attention of this Court. The decision of both the trial court and the Supreme Court of Oregon war with the facts on the record, the documents in the record, with common sense, and with well established judicial construction.

(c) The last minute pre-trial conference called for the time at which the trial itself was to start and for which Petitioner had subpoenaed numerous witnesses, was calculated to cut off any right of appeal from any erroneous finding in the pretrial order. The pre-trial order would supplant the pleadings. It is, or may be, an appealable order. It clearly was intended that Petitioner and her counsel would be "bulldozed" into commencing immediately into the trial without any opportunity to study and reflect on the order itself.

(d) Important federal constitutional rights, covering a broad spectrum (See exceptions and objections for the record, Appendix H) were drawn into question from the beginning. All were asserted promptly at the first opportunity. Both courts, moving in an unprecedented combination of judicial attainder, have frustrated, completely blocked and closed the doors to the assertion of such rights and to the pursuance of an investigation of what exactly has been and is being concealed in the Calendar Clerk's Office in Multnomah County. This reason alone will make this cause eminently cert worthy.

(e) This decision and the judicial attainder involved therein, results in a serious hindrance to the effective administration of the law caused by the decision. Those who seek a writ of mandamus in support of a motion for change of venue will still have to await the court's

pleasure of attention to it under its court rules. The venue laws still remain uncertain.

(f) Any decision which is shockingly wrong and presents substantial questions of Due Process, as here presented, and, if unjust, unreasonable and plainly wrong, should be heard on certiorari, even though no matter of public importance is involved. The aim and ideal of our system of justice is not just to have few miscarriages of justice, but to see that every man or woman receives his or her "due" in Due Process.

The posture of the Oregon Supreme Court on venue has eroded statutory and legal principles with results unduly harsh in their impact. Additionally, one could expect in that jurisdiction, unless this Court remedies the matter, continued doubtful and ambiguous determinations on venue. Here is no case which is merely academic or episodic. Here is no case which is merely a legal sport, not likely to recur again. Time will not bury judicial attainder such as this. It is in the keeping of this Court to see that proper and adequate safeguards are maintained to fully vindicate applicable federal rights, where they are properly and timely raised. Petitioner has raised them. (See Appendix I for the specific objections raised on federal constitutional grounds and when and where.) Her story, her grievances are substantial. Already--before this cause--seriously wrung out financially by Respondent lawyer in Lee v. Lee, Brown, supra, in which Respondent's conduct was palpably wrong and clearly in error, Petitioner, now virtually destitute, seeks to have her substantial federal claims fully heard by this Court.

The Oregon court rested its opinion on the very ground which was injected ex parte into the Order and Judgment of Dismissal nunc pro tunc of Judge

Beatty, deciding that neither of the statutes, ORS 18.23 or 18.260, cited by Judge Beatty as grounds for dismissal orally from the bench, were sufficient or applicable. Petitioner particularly raised the issue before the Oregon Supreme Court in her Reply Brief, as (b) on page 17, as to the federal constitutional Due Process denials in the procedure of the court in adding a ground of dismissal to the nunc pro tunc order without notice to Petitioner or counsel, and without opportunity afforded her counsel for hearing, although the matter was, apparently, discussed with Respondent's counsel. The Oregon Court refused to consider or discuss the federal Due Process violation asserted by Petitioner. This, in itself, is a denial of her federal Due Process and Equal Protection rights under the Fourteenth Amendment.

(h) The discriminatory action of the trial and Oregon Supreme courts in applying state court rules, as shown in detail above, has clearly resulted in evasion of the federal claim. Hartford Life Ins. Co. v. Johnson, 249 U.S. 490, 493; Wolfe v. North Carolina, 364 U.S. 177, 195.

CONCLUSION

The Appendices, the Record, Petitioner's Brief before the Supreme Court of Oregon, and the Objections and Exceptions for the record delineated in the trial court on December 8, 1971, all now before this Court, plainly show that Petitioner laid the underpinnings and foundations of her numerous federal constitutional rights from the very beginning to the last fulmination heard in the Supreme Court of Oregon.

The sum total of all of these constitutional rights has, with almost monotonous regularity, been blocked out and locked out. Petitioner deserves better from the courts of the state of Oregon. Petitioner deserves the vindication of her federal rights in this Court, to the end that not only she, but nameless and numerous

others throughout this land be not shot down and made virtually inert by the judicial attainder of various benches.

It is meet that at this time and in this case and while this Court sits, that you, Honored Sirs, speak out (1) on the timely importance of Due Process in state pre-trial conferences and (2) on change of venue statutes which do not adequately guarantee a fair trial in a fair milieu before an impartial tribunal, and (3) that the insidious and nefarious dangers of judicial attainder, as spelled out and defined by Petitioner in this Petition be recognized judicially and wholesome standards promulgated so that a party and her counsel may stand fearlessly and courteously in court, assert the client's and counsel's panoply of federal constitutional rights, all without fear of the overweening threat of contempt or the loss of a meritorious cause, or being buried in what purports to be "adequate state grounds," all because the cause is one which is unpopular with the bench and bar.

Respectfully submitted,

ALBERTA E. HEFFRON
145 Wilson, South
Salem, Oregon, 97302
Counsel of Record for Appellant
Admitted to practice before this Court.

WARREN CAMERON
Washington State Bar 1973
Membership No. 783
Seattle, Washington, 98104
Of Counsel

Appendix A.

No. 10,040—February 1, 1973

IN THE SUPREME COURT OF THE STATE OF OREGON

In Banc

LEE, *Appellant, v.* BROWN, *Respondent.*

Appeal from Circuit Court, Multnomah County.

John C. Beatty, Jr., Judge.

Argued and submitted September 11, 1972.

Warren Cameron, Seattle, Washington, argued the cause for appellant. With him on the briefs was Alberta Heffron, Salem.

John R. Sidman, Portland, argued the cause and filed a brief for respondent.

Affirmed.

BRYSON, J.

On June 15, 1970, plaintiff filed this action against the defendant demanding general and special damages. On October 20, 1971, the case was at issue on the pleadings.

ORS 3.380 provides:

> "The judges * * * of the circuit court of a judicial district described in ORS 3.310 [Multnomah County Circuit Court, Fourth Judicial District] may jointly make and promulgate all rules and regulations necessary and convenient to facilitate the transaction of the judicial business of the circuit court. * * *"

In accordance with rules 4.03 and 4.05(1) of the Circuit Court, Fourth Judicial District, the case was placed on the civil trial calendar for trial on Monday, November 8, 1971. The case was called for assignment

to a trial judge at 9 a.m. on Friday, November 5, 1971. It appears from the record that counsel for plaintiff did not attend the "daily call." The presiding judge assigned the case to Judge JOHN C. BEATTY, JR., for trial, to begin Monday, November 8, at 2 p.m., and the trial court received the daily assignment slip and the case file from the court clerk. The court examined the pleadings and noting that they were quite lengthy, advised both counsel on Friday afternoon that he would like to have a pretrial conference (Rule 6.00, Fourth Judicial District) at 9 a.m. on November 8. On Monday morning when both counsel and parties and witnesses under subpoena were present, the plaintiff filed a motion and supporting affidavits for change of venue. Plaintiff's affidavit, in part, alleged that Judge WILLIAM DALE, JR., was prejudiced against her and "that his influence and power as presiding judge over the judges of Multnomah County, and the handling and management of this case is so great that I cannot have a fair trial in Multnomah County * * *."

The motion for change of venue was timely filed pursuant to ORS 14.120. Plaintiff, in support of the motion, relied upon ORS 14.110, which provides:

> "(1) The court or judge thereof may change the place of trial, on the motion of either party to an action or suit, when it appears from the affidavit of such party that the motion is not made for the purpose of delay and, either:
>
> "* * * * *
>
> "(d) In an action, that the judge or the inhabitants of the county are so prejudiced against the party making the motion that he cannot expect an impartial trial before said judge or in said county, as the case may be.
>
> "* * * * * *."

The trial court denied the motion for change of venue. It should be noted that the motion and the affidavits supporting the same do not state that Judge BEATTY or the inhabitants of the county are prejudiced against the plaintiff but, rather, states that Judge DALE was prejudiced against her. At this point of the proceeding Judge DALE had nothing to do with the case as it had been assigned to Judge BEATTY for trial. Plaintiff's counsel then stated:

> "In view of the refusal of the motion to change the venue, it's her [plaintiff's] instructions to us, acting for her, to file forthwith an appeal for mandamus in the Supreme Court of Oregon.
>
> "Accordingly, these papers are to be prepared and ready to be presented for your acceptance, sir.
>
> "THE COURT: Well, until that petition is filed, I assume it's of no further force and effect until the petition for mandamus is filed, and action taken by the Supreme Court.
>
> "We will continue with our proceedings in this court."

Counsel for plaintiff refused to participate in the preparation of a pretrial order and stated to the court, "we are not going to trial at this time." Plaintiff forthwith filed in this court a petition for an alternative writ of mandamus to compel Judges DALE and BEATTY to issue an order to change the venue of the within case to Clackamas County. We denied the petition on November 30, 1971.

On motion of the defendant, the trial court entered the following Order and Judgment of Dismissal:

> "Plaintiff in open court through her attorneys of record, having refused to proceed with trial in this department upon the date, time and place as-

signed for trial, and having refused to request the Presiding Judge for reassignment to another trial department, despite assurance that such assignment would be made upon request, and the Court having delivered its opinion and having made findings;

"Under ORS 18.230, under ORS 18.260, upon motion by defendant, and under the Court's common law power on its own motion to dismiss a case where a party refused to proceed with trial; IT IS HEREBY ORDERED, ADJUDGED and DECREED that the above cause be, and the same is, hereby dismissed, and that judgment be entered against plaintiff and in favor of defendant and that defendant have and recover his costs taxed at $————.

"DATED at Portland, Oregon, this 17th day of November, 1971.

/s/ J. C. Beatty
CIRCUIT JUDGE"

Plaintiff appeals from the order of dismissal.

Plaintiff designates numerous assignments of error. The most fundamental one is her contention that

"THE JURISDICTION OF THE LOWER COURT WAS SUSPENDED ON THE PROPER NOVEMBER 8 SERVICE AND THE NOVEMBER 9 at 8:30 A.M. FILING OF THE PETITION FOR WRIT OF MANDAMUS IN THE SUPREME COURT, AND ALL PROCEEDINGS AFTER 8:30 A.M. ON ON [sic] NOVEMBER 9 IN JUDGE BEATTY'S COURT WERE VOID AND WITHOUT JURISDICTION."

Plaintiff correctly contends that the remedy for an erroneous refusal to grant a change of venue is by way of petition for writ of mandamus. *Roskop v. Trent*, 250 Or 397, 400, 443 P2d 174 (1968). However, no cases are cited for the proposition that the jurisdiction of

the lower court is suspended upon filing a petition for writ of mandamus against the judges of that court. We have not previously spoken on the subject. Mandamus is an extraordinary remedy at law to which the rules of procedure relating to actions at law are applicable. *Buell v. Jefferson County Court*, 175 Or 402, 408, 152 P2d 578 (1944); ORS 34.130, 34.190.

The mandamus proceeding was in no sense an appeal from or a proceeding ancillary to this case which was at issue in Multnomah County. The parties and issues involved and the relief sought in mandamus were different from those involved in the pending action. The importance of these distinctions is not diminished by the fact that the outcome of the mandamus proceeding could have had a substantial impact on the outcome of the action before Judge BEATTY. We hold that the mere pendency of a mandamus proceeding does not of itself deprive the trial court in the initial proceeding of its jurisdiction to go forward with the case unless this court, on the petition for writ of mandamus, specifically orders the stay of the proceeding in the lower court or grants other affirmative relief effecting such a result.

The plaintiff also contends that the trial court erred in entering an order and judgment of dismissal with prejudice under ORS 18.230, 18.260 or "under any claimed common law powers" and that the order of dismissal was an abuse of discretion.

The order and judgment of dismissal, as previously set forth, does not decree that the case was dismissed "with prejudice," as contended by the plaintiff. The judgment entered did not determine any of the issues framed by the pleadings and did not bar

another action for the same cause. An order of dismissal of an action signifies, not a final judgment on the controversy, but an ending of that particular proceeding. *Mills v. Feiock*, 229 Or 618, 623, 368 P2d 327 (1962); *White v. Pacific Tel. & Tel. Co.*, 168 Or 371, 376, 123 P2d 193 (1942).

The court based its order of dismissal on ORS 18.230, 18.260, and "the Court's common law power." We agree with plaintiff that ORS 18.230 does not apply. ORS 18.260 generally provides for the giving of notice and the dismissing of cases "in which no action has been taken for one year." It further provides, "nothing contained in this section shall prevent the dismissing at any time, for want of prosecution, of any suit, action or proceeding upon motion of any party thereto." We find no statutory provision that deals specifically with the situation where counsel arbitrarily refuses to go to trial. It is understandable that there are few cases and little law on the matter. Of course, plaintiff's counsel was proceeding under the mistaken concept that the filing of the petition for writ of mandamus in this court stayed the action at the trial court level.

This court has consistently held that the manner of conducting the trial of a cause must be left to the discretion of the trial judge, assuming that this discretion is not arbitrarily exercised. *Thomas v. Foglio*, 231 Or 187, 191, 371 P2d 693 (1962).

> "• • • The manner of conducting a trial rests in the sound discretion of the trial court and we can not say that there was any abuse of that discretion in this case. [Citations omitted.]" *Phillips, Gdn. v. Creighton, Adm.*, 211 Or 645, 649, 316 P2d 302 (1957).

In *Diment v. Bloom*, 67 Minn 111, 69 NW 700 (1897), the plaintiff failed to appear at the time appointed for his trial. The trial court entered judgment on the merits for defendant. The Supreme Court of Minnesota reversed, stating that "it was error for the court to order any judgment but that of dismissal." *Id.* at 112, 69 NW at 701.

In *Hineline v. Minneapolis Honeywell Regulator Co.*, 78 F2d 854 (8th Cir 1935), plaintiff's case was called and plaintiff announced the case for trial. When the case was assigned out for trial, plaintiff stated that he could not proceed to trial. Upon the defendant's motion, the case was ordered dismissed without prejudice. Concerning the propriety of this handling of the case, the court for the Eighth Circuit stated:

> "* * * Upon the plaintiff's refusal to proceed the first time, the court had no power to do anything except dismiss without prejudice. * * *" *Id.* at 857 (Citations omitted.)

In *Reed v. First Nat. Bank of Gardiner*, 194 Or 45, 55, 241 P2d 109 (1952), we stated:

> "Public policy demands that actions be diligently prosecuted. It is a duty of the plaintiff to prosecute his case with due diligence, and, if he fails in this duty, the consequences are the same as though no action had been begun. For a failure of plaintiff to perform his duty in the respects noted, the action may be dismissed for want of prosecution.
>
> "It is well established by the overwhelming weight of authority that the power of a court to dismiss an action for want of prosecution is an inherent power, and it exists independently of statute or rule of court. * * *"

To the same effect, *see Pemberton v. Pemberton*, 230

Or 190, 193, 369 P2d 276 (1962), and cases cited therein.

In *Downey v. Long,* 258 Or 197, 199, 482 P2d 162 (1971), we held:

> "The law is well established that, wholly independent of statutory provisions, the trial court has the inherent power to dismiss an action for want of prosecution; the trial court's dismissal will not be disturbed unless the court abused its judicial discretion. *Longyear, Admx. v. Edwards,* 217 Or 314, 342 P2d 762 (1959)."

It is a matter of semantics to say there is a distinction between a party failing to prosecute his case and one refusing to go to trial when the case is assigned for trial and the attorneys, parties, and witnesses are present in the courtroom. The record in this case demonstrates that the trial judge did everything within his power to encourage the plaintiff to proceed with the trial of the case. There is no evidence that he abused his discretion in entering the order of dismissal.

The plaintiff also contends that the trial court erred in failing to acknowledge plaintiff's right to a jury trial. There is no substance to this assignment of error. The record shows that the trial judge, on three occasions, advised the plaintiff that she would have a jury trial on the facts.

We have examined plaintiff's other assignments of error, some repetitious of those we have written to, and deem them not relevant to this appeal.

Affirmed.

APPENDIX B

(Journal entry of Order Denying

Petition for Rehearing.)

BE IT REMEMBERED that at a regular term of the SUPREME COURT of the State of Oregon begun and held at the courtroom in the city of Salem on the first Monday, the day of , WHEREUPON on this WEDNESDAY, the 21st day of March, 1973, the same being the 7th judicial day of said term, when the following proceedings were had:

DOROTHY B. LEE, Appellant	)	
v.	)	Appeal from MULTNOMAH COUNTY
RAY G. BROWN, Respondent	)	

The court having duly considered appellant's petition for rehearing, and being fully advised therein,

IT HEREBY IS ORDERED that said petition is denied.

APPENDIX C

OREGON CONSTITUTION

Article I.

Section 10. Administration of Justice. No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.--

---

Section 17. Jury trial in civil cases. In all civil cases the right of Trial by Jury shall remain inviolate.--

OREGON REVISED STATUTES ON CHANGE OF VENUE

14.110 When place of trial may be changed. (1) The court or judge thereof may change the place of trial, on the motion of either party to an action or suit, when it appears from the affidavit of such party that the motion is not made for the purpose of delay, and, either:

(a) That the action or suit has not been commenced in the proper county; or

(b) That the judge is a party to, or directly interested in the event of the action or suit, or connected by consanguinity or affinity within the third degree, with the adverse party or those for whom he prosecutes or defends; or

(c) That the convenience of witnesses and the parties would be promoted by such change; or

(d) In an action, that the judge or the inhabitants of the county are so prejudiced against the party making the motion that he cannot expect an impartial trial before said judge or in said county, as the case may be.

(2) When the moving party in an action is a nonresident of the county, the affidavit above required may be made by any one on his behalf.

14.120 Time of Motion; to what county changed; number of changes. The motion for a change of the place of trial may be made and allowed at any time after the commencement of the action or suit and before the beginning of trial, except that, if the change sought is pursuant to the provisions of paragraph (a) of subsection (1) of ORS 14.110, the motion must be made before filing the answer. If the motion is allowed, the change shall be made to the county where the action or suit ought to have been commenced, if it is for the cause mentioned in paragraph (a) of subsection (1) of ORS 14.110, and in other cases to the most convenient county where the cause assigned as the reason for the change does not exist. Neither par-

ty shall be entitled to more than one change of the place of trial, except for causes not in existence when the first change was allowed.

/Amended by 1963 c. 339 § 1./

Appendix E-I

CIRCUIT COURT OF THE STATE OF OREGON
Fourth Judicial District
RULES OF COURT

CHAPTER VI RULES RELATING TO TRIALS

RULE 6.00 PRE-TRIAL PROCEDURE; FORMULATING ISSUES.

In any proceeding the Court may, in its discretion, direct the attorneys for the parties to appear before the Court for a conference to consider:

(a) The simplification of the issues;

(b) The necessity or desirability of amendments to the pleadings;

(c) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(d) The limitation of the number of expert witnesses;

(e) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(f) A reference in whole or in part; or

(g) Such other matters as may aid in the disposition of the action.

Appendix E-2

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

IN THE MATTER OF RULES OF THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH	ORDER

IT IS HEREBY CONSIDERED AND ORDERED that the following revised rules of procedure of the Circuit Court of the State of Oregon for Multnomah County be adopted, effective October 1, 1965, except for Chapter X, which shall become effective November 1, 1965.

IT IS FURTHER CONSIDERED AND ORDERED that the Clerk of Multnomah County, Oregon, be and he is hereby ordered and directed to enter said Rules in the Journal of said Circuit Court, and all other orders heretofore made inconsistent herewith are hereby vacated.

Dated this 21st day of June, 1965.

DEAN F. BRYSON	VIRGIL LANGTRY
RICHARD J. BURKE	HARLOW F. LENON
CHARLES S. CROOKHAM	JEAN L. LEWIS
CARL A. DAHL	JOHN J. MURCHISON
ALAN F. DAVIS	CHARLES W. REDDING
WILLIAM L. DICKSON	PHILLIP J. ROTH
PAUL R. HARRIS	HERBERT M. SCHWAB
ROBERT E. JONES	ALFRED T. SULMONETTI

Circuit Court Judges

APPENDIX F

F-1

AFFIDAVIT OF WARREN CAMERON

(Exhibit A on Ex Parte Motion to Impound Records)

STATE OF OREGON) ss
COUNTY OF MARION)

I Warren Cameron, being duly sworn on oath, depose and say:

That I am of counsel for Appellant, Dorothy Lee, in the appeal of Lee v. Brown, Cause No. 359-386, Multnomah County, now on appeal to this Court. That copies of the complete transcript of the proceedings in said cause, in which there was no trial, were filed as "Exhibit K" in a certain Amended and Supplemental Petition for Mandamus, entitled "Dorothy B. Lee vs The Honorable William M. Dale, Jr., Presiding Judge of the Circuit Court of the Fourth Judicial District, and the Honorable John C. Beatty, Jr., Judge of said Court," filed in the Supreme Court of Oregon on November 23, 1971 and are on file therein, and references herein to pages in the Transcript are references to that Transcript, which is part of the Court Records of the Supreme Court.

That Friday, March 17 and Monday, March 20th, represent the first day since the November 8th and 9th hearings in the cause at bar before Judge Beatty that co-counsel Heffron and I have been able jointly to review the records at the Multnomah County Court House in Portland. Following the hearings of November 8th and 9th and continuously through to January 22nd, I was totally engrossed in Court matters, and particularly appeal work, in my home state and elsewhere. After approximately one month's hospitalization from late January (January 22) to latter February, I was, between February 24 and March 17, 1972, allowed by my doctor to do limited library work and writing, while convalescing. That Friday, March 17, 1972, after a brief stop at the Clerk's office of the Supreme Court, I

went to the Multnomah County Court House in Portland for the purpose of examining the records as they relate to this appeal.

That I did so examine the records with co-counsel Heffron and we scrutinized and had xeroxed various papers, including the Court's Exhibit No. 6 in this cause, a copy of which (front and back, marked "Exhibit 1" is attached to this Affidavit and by this reference made a part hereof.

This exhibit was on November 9, 1971, denominated an "assignment slip" (Tr 58, li 8) by Judge Beatty and by him, during the course of an "opinion and ruling on the questions raised" (Tr 56) introduced as "Court's Exhibit 6." (Tr. 58) At Tr 58, lines 5-20, this assignment slip was represented as a slip made by the "Clerk" and attached to the file, noting the case as a non-jury case." The judge further stated: "The assignment slip has no legal significance at all." At Tr 57, lines 13-14, the judge said, "I told her /Counsel Heffron/ the assignment slip showed the case as a court case," (referring to a telephone call to Counsel Heffron late Friday, November 5, 1971.) Co-counsel Heffron and I, at all times, based on the statements of the judge in open court (See Tr 2, line 25, Tr 3, lines 1-17); Tr 57, lines 13,14; Tr 58, lines 5-12, and his conversations with Counsel Heffron on the telephone November 5, had been given the impression that the "assignment slip" had come from the Calendar Clerk's office in regular course, and had been made up in that office.

No opportunity was given to counsel on November 9 when the assignment slip was introduced to look at it, or to examine the exhibit, nor had we seen it before; no opportunity was afforded to voir dire anyone who might have had any connection with the exhibit, to introduce rebuttal or impeachment evidence, and no foundation whatsoever was laid as to the identity of the slip and the circumstances under which it was made except by the judge himself; no opportunity was given to enter exceptions or objections into the record as to it. (Tr 67, lines 15-23.)

The introduction of a piece of evidence, thus

was made during an "opinion and ruling" without any amenities of due process being observed or honored--a highly unusual procedure in itself, especially since it was introduced sua sponte by the judge himself--was contrary to usual procedures and contrary to accepted principles stated in Wigmore on Evidence, Vol. 9, 3d ed, Secs 2483-4.

At or about 3:00 P.M. on March 17th, I went to Room 546 to interview the Calendar Clerk of Multnomah County Circuit Court, Evelyn Nichols. I introduced myself as of counsel for the Plaintiff and presented her with my credentials. During the interview, I asked her how long she had worked there and she indicated sixteen years. She further indicated that as Calendar Clerk she was usually present herself in the court of the Presiding Judge on Friday mornings when cases are assigned. She stated that she was present in Court on the morning of Friday, November 5, 1971 when Presiding Judge Dale set the calendar and that John Sidman, Counsel for Defendant-Respondent, was present.

By way of background, Counsel Heffron had advised me that she had previously received a card (See Exhibit C-1, lower exhibit of Appellant's brief, page 92, copy furnished herewith) which, since she had been prepared to go to trial, under the rules did not require her to be present (Rule 4.04 (4) of the Fourth Judicial District; copy of Rules of Court submitted to the Court); she further explained that she had been advised by Judge Dale in August, both by telephone and by letter (See Appendix p. 94 of Brief) that the case would not be continued further. She further stated that it would have been futile for her to have appeared on November 5, 1971 to advise the Court that they were not yet at issue on all of the facts. Rule 4.04 (4) states that nonappearance by an attorney is "deemed a certification that he is ready unequivocally to proceed to trial on the date set for each case" and that it was not necessary for her (Counsel Heffron) to be present, notwithstanding the matter was not completely at issue. The Court had been advised on November 5 also that Plaintiff had a Supplemental Complaint, bringing

facts down to date, which Plaintiff would want to file.

I asked Evelyn Nichols whether Exhibit 1, annexed hereto (Court's exhibit 6, Circuit Court form #18) was the form usually used for "assignment slips" in this Circuit Court for the Fourth Judicial District (Multnomah County). She stated, "No."

She further stated that the form generally used and filled out by her office was a cardboard card (See Appellant's Brief, p. 96, copy submitted herewith.) I noted that this cardboard form, called a "trial card" has no space on it for the words, "court or jury trial." Showing her Court Exhibit 6 copy (Exhibit 1 annexed hereto), I asked her what use this form normally had and whether it was used for any official purpose in her office. She replied that this was simply a form used by her and others in her office to record "material that I get from downstairs." She said that such forms are made up in pads and also used by some of the court room staffs, and are used only for intraoffice purposes.

I then asked her especially whether she could identify the handwriting on "Exhibit A" of Appendix to Appellant's Brief (Court's Exhibit 6). She stated, "Yes, I am quite sure that this is the handwriting of Sue Rommel." She then identified Sue Rommel as secretary-bailiff of Judge Beatty. Later, after leaving Evelyn Nichols' office, I consulted the building telephone directory of the Multnomah County Court House and noted that Sue Rommel is listed as in Room 530 and that this is the same room number as Judge Beatty. (See Exhibit 2, copies of two pages from the Building telephone directory annexed hereto and incorporated herein by reference.)

I asked Evelyn Nichols whether an "assignment slip" in the form used in Court's Exhibit 6, "Exhibit 1" annexed hereto and by this reference incorporated herein, had ever been used by her office as a regular "assignment" form; she indicated that the cardboard trial card (Exhibit E-1, page 96 of brief, lefthand form, copy of this page submitted herewith for Court's convenience) was the regular assignment card and that she had never made one up on a form such as shown on Court's Exhibit 6 and

that they had never been used by her office during the time she had been Calendar Clerk. Evelyn Nichols further stated that the Presiding Judge normally asks attorneys at the Friday Calendar call whether the cause is a Court or Jury trial, and when they answer, "This is put down by me in my stenographic notes." She said one attorney may answer for both attorneys.

I had previously consulted with Co-Counsel Heffron as to whether Mr. Sidman had in any way contacted her (Heffron) on Friday, November 5, 1971, or before, as to the setting of the case at bar for other than a jury trial. Mrs. Heffron was emphatic in her denial, "No, never." She further explained that on October 1st at an argument when Mr. Sidman was present, she had carefully obtained a commitment from Judge Dale that Plaintiff would have a jury trial.

I further asked Evelyn Nichols what the term in the large print at the bottom of Court's Exhibit 6 to the left, "5 Days" meant, and she said that that was the estimated trial time of the case.

I then asked her whether she had any independent recollection regarding the details of the assignment of Cause No. 359-386, the case at bar, and she stated, "No, except that I know of it generally." I then pointed out that I was an attorney and officer of the court and asked whether I might have permission to look at the office records concerning this case. Her reply was, in substance, "No, they are in stenographic notes and you would not be able to read them." Then I asked her, "May I not, in my attorney's capacity as an officer of the court, see them?" She stated, "No, these are not open to the public."

I asked Evelyn Nichols whether pre-trial procedures were also determined and assigned by the Presiding Judge. She stated, "No, we don't have pre-trial procedures. They are not assigned. A case is not assigned unless both sides are ready for trial. This /pre-trial/ is a matter for the individual judge."

I returned to confer again with Evelyn Nichols on Monday afternoon, March 20, 1972 at about 3:30

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Sidman was present at calendar call on Friday morning, November 5, 1971 and she said, "Yes, otherwise the entry on this card (pointing to Exhibit 3) would never have been made as to 'court' or 'jury' trial." Mr. Sidman, as stated above, at no time consulted with or contacted Co-counsel Heffron on this matter.

After completing the interview with Evelyn Nichols, I looked at the register pages of this case in the Clerk's office and checked particularly the entries from November 5, 1971, on. (See photostatic copies of the Register Sheets, annexed hereto, marked "Exhibit 4" and by this reference incorporated herein). On both March 17 and March 20, Co-counsel Heffron searched the file through and reported to me that the Motion for Preservation of Jury Trial was not in the file, although we had filed it in the Clerk's office on November 8 at 8:05 and delivered it to Judge Beatty's secretary-Bailiff shortly after 8:30 when she came, along with the Motion for Change of Venue, which had been filed at 8:06. The Register sheets show no entry of the Motion for Preservation of Jury Trial.

In Tr 8, lines 18-21, the Court asks, "Have you made a formal request for jury trial?" This is to be read in the light of Judge Beatty's statement at Tr 6, lines 19-21.

/S/ WARREN CAMERON

SUBSCRIBED and sworn to before me this 31 day of March, 1972.

/S/ PATRICIA FISCHER
Notary Public for Oregon
My commission expires:
12-21-73.

NOTARIAL SEAL

NOTE: The exhibits referred to in the foregoing Affidavit, and which were attached to the original, have been omitted from this copy purposely. They are part of the Transcript which is before this Court, as part of "Ex Parte Motion to Impound Records, to Appoint Referee to Take Testimony, To Supplement and Augment the Records, and For Leave to File Supplemental Briefs Thereafter." But see Appendix M for copy of Master File Card.

AFFIDAVIT

STATE OF OREGON) SS
COUNTY OF MARION)

I, Alberta Heffron, being sworn on oath, say:

That I am the resident Oregon attorney for Plaintiff-Appellant in the within cause, and that I was present in the Court Chambers of the Supreme Court of Oregon on September 11 during oral arguments on the within cause and heard the arguments of Counsel Warren Cameron on behalf of Plaintiff-Appellant Dorothy Lee, and of John R. Sidman, attorney for Defendant-Respondent.

That I heard and noted the admission of counsel John C. Sidman in his oral argument that he had contacted Judge Beatty, or that Judge Beatty had contacted him by telephone subsequent to November 9, 1971, the last day of the proceedings in court in said cause, and that a discussion was had over the telephone respecting an Order of Dismissal "with prejudice or without prejudice"; that within a day or two following the oral argument, I contacted Mr. Harvey Shafer, the Bailiff of the Supreme Court, and made arrangements to make a tape recording from his original taped recording of the entire arguments in the foregoing cause; that, in consequence, I did, approximately two or three days later, bring my own tape recorder to the Chambers of the Supreme Court, and under the direction and supervision of Court personnel, and later of Mr. Shafer himself, I made a taped copy of the original arguments in toto, including the entire arguments of both Mr. Cameron and Mr. Sidman, in full.

That, during the course of Counsel Sidman's argument he made the following admissions and statements, included here verbatim, together with the verbatim Reply of Counsel Warren Cameron:

> Mr. Sidman: "***Because of what the Judge had said the following day--the previous day--I had prepared and presented to the Court at that time a motion--or the Order of Dismissal

with Prejudice. The Court called me and felt that because it was not signed --or I called the Court, I don't recall which--and the Court wanted to do some research to determine whether or not the Court could, in fact, sign an Order with prejudice, or without prejudice. As a result of that, the Court prepared the Order which now rests in the file. * * *"

Mr. Cameron: "I was intensely interested in a statement of Mr. Sidman's which was, I think, quite revealing: 'The Court called me regarding this Order on prejudice.' There is nothing that I know of that shows that either Mrs. Heffron or myself were in any way contacted. Judge Beatty had previously mentioned to me during one of the noonhour recesses that any matter relating to this case should be discussed with both counsel present. I think that this is, indeed, a spike driven right into the heart of any defense which the Defendant might make * * "

That at no time was Mr. Cameron or myself notified that there would be any conference or communication or discussion regarding the preparation of a nunc pro tunc order, or the jurisdiction of the court to make an order of dismissal either with or without prejudice, or nunc pro tunc, or respecting the addition of grounds for dismissal not mentioned in the proceedings on November 8 and 9, 1971; that I was never present at any time when the matter was discussed between Mr. Sidman and Judge Beatty; that I am advised by Mr. Cameron that he had no notice of such communications between the Judge and Respondent's counsel and knew of none, and was not present at the time of such communications; that neither of us were aware of such communications between Judge Beatty and Mr. Sidman until September 11, 1972 when he made such admission in oral argument; that neither of us were aware that an additional

ground would be relied upon by Judge Beatty for a nunc pro tunc dismissal until the Judgment had been signed and was of record and copy was received by me.

/S/ ALBERTA HEFFRON

SUBSCRIBED and sworn to before me this 17th day of January, 1973.

Notarial seal

/ S/ PATRICIA FISCHER
Notary Public for Oregon
My commission expires 12-21-73.

The foregoing Affidavit is the supporting document for a Motion to Augment the Record and to Reconsider September, 1972, Motion to Impound Records and to Augment the Record which was filed January 17, 1973 in the Supreme Court of Oregon and is part of the record before this Court in the Transcript.

APPENDIX G.

BACKGROUND OF THE CASE

In June, 1968, Petitioner employed Respondent to represent her in a divorce case brought against her by Jason D. Lee, a Salem, Oregon, attorney, and later to represent her in a case for alienation of affections against Jason Lee's mother, Myrtle Lee.

The parties were married for 28 years, had three children and Petitioner performed valuable services which contributed to the husband's legal career and to property accumulated during the marriage. In April, 1968, Petitioner found and delivered to Respondent documents--largely correspondence--showing that Jason Lee and his mother had been hiding assets--largely cash and stock--in anticipation of a divorce. This was property either originally in the marriage, or which belonged in the marriage, including proceeds from real property which Petitioner had personally renovated. These documents further disclosed that they intended to hide them from the divorce court.*

Respondent agreed from the beginning that he would take certain steps to protect the Petitioner against the fraud and would ensure her a fair settlement, would obtain an order making Myrtle Lee a party to the divorce as holding property, obtain a restraining order against Jason Lee and Myrtle Lee to prevent dissipation and further transfer of assets, obtain a restraining order to secure Petitioner against incursion of her residence and harassment of her personally by Jason Lee, would obtain an order for support, an order for custody of the minor son and support for him; would obtain an order for accounting from Jason Lee and Myrtle Lee so that property over which the divorce court of Oregon should have jurisdiction would be accounted for.

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* Under Chapter 107 of Oregon Revised Statutes, the Divorce Court of Oregon has power to award property of one spouse to the other, as well as to divide marital property.

In fact, Respondent did not do the things he said he would do. He made no diligent effort to obtain any support order either for Petitioner or for the minor son, to obtain any accounting or to have Myrtle Lee made a party, and made no immediate effort to obtain a restraining order, although repeatedly requested by Petitioner to do so. The result was that Jason Lee made repeated incursions into Petitioner's home, removed and photographed business correspondence between Petitioner and Respondent, some of which he used against Respondent, in a hearing in the alienations case in connection with service of summons on the defendant. Petitioner was impaired in the prosecution of her cases because of the removal of the correspondence and business information. Moreover Jason Lee continued to dissipate and transfer assets pending the divorce, until finally restrained in October, 1968.

A purported hearing on the divorce itself was held on May 27th, 1969 at which time a property settlement was stipulated into the record in which Petitioner was to have cash in the sum of $36,000 within 30 days, plus a heavily mortgaged residence in which she resided and the furnishings, she to pay the mortgage. Respondent had been advised that Petitioner's husband had been reprimanded by the Oregon Supreme Court for misconduct bordering on fraud (In re conduct of Jason Lee, 242 Or. 302, 304,306, 409 P2d 337, 1965). Nevertheless, Respondent made no effort on May 27th to protect Appellant against further fraud of Jason Lee and his mother. Immediately following the purported hearing, at which Petitioner was awarded the divorce in an oral order from the bench, Jason Lee repudiated the agreement, took steps to delay the signing of the Decree, refused to perform on the agreement and succeeded in delaying the signing of the decree until July 15, 1969 when Respondent and adverse counsel were called in for conference with the Court. With notice of Jason Lee's intention to take an appeal, contrary to the understanding of the parties, Respondent made no effort to call the fraud to the attention of the court. In a deposition which

is before this Court in this cause, taken of Respondent on October 14 and 18, 1971, Respondent admitted having listened to Jason Lee (alone) for 45 minutes (Dep. 42-44) and having had "several" other conferences (Dep. 45, lines 18-25, p. 46, lines 1-4) when Petitioner was not present and about which she knew nothing until sometime later. (Dep. 46-48.)

Subsequent to the signing of the decree* on July 15, 1969, Jason Lee made fraudulent transfers of all of his assets, some to his mother, some to his secretary, and encumbered the rest. He did take an appeal, which was, ultimately dismissed. He refused to perform on the agreement until January, 1970, when threatened with contempt. Respondent did not call the violations of the restraining order to the court, nor did he obtain performance on the agreement or the decree, and it was necessary for Petitioner to discharge Respondent in October, 1969 and obtain other representation to seek enforcement of the Decree and collection of the $36,000 which Jason Lee was to have paid by the 26th of June, 1969.

Petitioner requested that Respondent furnish her with an itemized statement of his expenses and of his claim for services. He refused to do so and failed to respond until January, 1970. On January 30, 1970, just after the settlement was finally paid, he appeared in court when another matter was under consideration and asserted an attorney's lien for an unspecified amount. He had attempted to hold himself in Petitioner's cases by a so-called "Joinder of Counsel" with Petitioner's substitute attorneys and it was only by vigorous assertion of her right to discharge him that Petitioner separated him from her cases in late 1969.

On March 6, 1970, in the face of citation

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*A suit is presently pending in Multnomah County, filed in October, 1971, to set aside the Decree and settlement as void and for fraud. No service of summons was made on the district attorney and this failure has been held in other cases to be a fatal jurisdictional defect.

of authority by Petitioner's counsel that the Court had no jurisdiction in a summary hearing to adjudicate Respondent's claim of lien, a summary hearing was held at Respondent's insistence. Then, for the first time, Petitioner learned that Respondent claimed a fee of $13,000--nearly one-third of the settlement. Because of Respondent's stubborn determination to carry through on a summary proceeding, it was necessary for Petitioner to take the matter of the erroneous judgment to the Oregon Court of Appeals, where the judgment was reversed. The Court there (Lee v. Lee, Brown, 5 Or. App. 74, 482 P2d 745) held the lower court lacked jurisdiction. Nevertheless, in excess of $6,000 of Petitioner's funds are withheld on Respondent's claim, and the cost of fighting through the appeal were approximately $15,000.

This case was commenced on June 15, 1971 by filing of the Complaint in Multnomah County and filing of an Application for Jury Trial, with service of the Complaint, Summons and Application for jury trial upon the Respondent in Portland, Multnomah County, Oregon.

APPENDIX H.

IN THE CIRCUIT COURT OF THE STATE OF OREGON IN AND
MULTNOMAH COUNTY

DOROTHY B. LEE,	)	AT LAW
Plaintiff,	)	CAUSE No. 359-386
-vs-	)	
	)	PLAINTIFF'S
RAY G. BROWN,	)	OBJECTIONS AND EXCEP-
Defendant.	)	TIONS FOR THE RECORD.

COME NOW Counsel for the Plaintiff, and for th record enter exceptions and objections to the rulin and acts of this Court in the above cause in certain proceedings had on November 8th and 9th, 1971, in denying Plaintiff's Motion for Change of Venue and in Dismissing the above cause with prejudice:

1. The trial court, per Judges William Dale and John C. Beatty, Jr., erred in ruling that the equitable defenses in the Third Amended Answer of Defendant Brown should not be removed as defenses and that the refusal to remove the same is contrary to the case law of the Oregon Supreme Court and of Canon 20 of the Canons of Judicial Ethics.

2. The trial court erred in refusing to make an unqualified ruling that Plaintiff would be entitled to a jury trial, all such rulings being conditioned upon Plaintiff's entering into a pretrial conference, all in violation of Article I, Sections 1, 8, 10, 17, 20 and 33 of the Oregon Constitution, nor were there assurances as to when such ruling would be made.

3. The trial court erred in repeated and persistent interruptions of Counsel in attempting to present argument, in circumscribing Plaintiff's counsel in the right to assert necessary arguments relative to Plaintiff's case and in limiting Plaintiff's counsels' rights of speech, press, association, petition and assembly, all in violation of Amendments I, IX and XIV, Section 1 of the United States Constitution and Article I, Sections 1, 8, 10, 20, 26 and 33 of the Oregon Constitution.

4. The trial court erred in limiting Plaintiff's counsel to citations involving Oregon cases only, whereas Counsel presented controlling cases of the Supreme Court of the United States, involving Plaintiff's constitutional rights.

5. The trial court erred in its insistence that Plaintiff and Counsel go to trial "forthwith" in the face of a Motion to Change Venue, supported by proper affidavits showing good faith and good reason therefor, and that Plaintiff waive her rights to insist on change of said cause to another county where the cause would not exist, in view of the showing that the cause involves an attorney, an officer of the Multnomah County Circuit Court, regularly practicing before it, and that prejudice was demonstrated in the supporting affidavits, and that such prejudice manifested a showing that Plaintiff could not obtain a fair and impartial trial in Multnomah County under the circumstances of this case.

6. The trial court erred in holding that the Motion for Change of Venue was not timely filed, in view of the fact that the Motion was filed before the trial had "begun" and at the earliest possible time under the particular circumstances of this case.

7. The trial court erred in confusing a Motion for Change of Venue to another county (ORS 14.110 and 14.120) with the statutory affidavit for change of judge (ORS 14.270) as evidenced in its findings of Judge Beatty on November 9th, further compounded by Judge Beatty's offer of another Judge on the Multnomah County Circuit Court panel, all serving under Defendant Dale.

8. The trial court erred in failing to grant a change of venue to another county where the cause of prejudice does not exist, under ORS 14.110 and 14.120, and the mandatory word of "shall" of 14.120, plus the additional factor that neither arguments were heard from Defendant in the above cause, nor counter affidavits invited nor offered, and that, therefore, under the doctrine of Rugenstein v. Ottenheimer, 78 Or. 371, 152 Pac 215 (1915) allegations of the affidavits are presumed to be true, all contrary to due process as guaranteed under Amendments I, IX, XIV, Sec. 1 of the U. S. Constitution and Article I, Sections 1, 8, 10, 20, 26 and 33 of the Oregon Constitution.

9. That as applied to the facts of this cause,

ORS 14.110, insofar as it sanctions a judge's judging his own prejudice, is unconstitutional, as contrary to Amendment XIV, Sec. 1 of the U. S. Constitution, and to Article I, Sections 1, 8, 10, 20 and 33 of the Oregon Constitution.

10. That the trial court erred in dismissing the above cause with prejudice, such dismissal being without statutory authority in the face of the motion for change of venue and the filing of the original Petition for Mandamus herein.

11. The trial court erred in denying to Plaintiff and her counsel the fundamental rights to be heard on such proposed dismissal with prejudice, the record disclosing that such dismissal was prejudged in advance (Tr. 54, lines 1 & 2), and in denying to Plaintiff and her counsel the right to enter into the record the objections thereto, and the fact that such arbitrary action on the part of the trial court operated to take Plaintiff's property without due process, all contrary to the laws of Oregon and the Constitution of Oregon, Article I, Sections 1, 8, 10, 20 and 33 and of the United States Amendments I, IX and XIV, Section 1.

12. The trial court erred in denying to Plaintiff's counsel the right to enter into the record objections and exceptions to prejudicial actions within the court room, not otherwise evident in the record, in the form of observations regarding manifestations of hostility on the part of the trial judge and employees and court personnel, toward Plaintiff and her counsel in this cause, all in violation of Article I, Sections 1, 8, 10, 20 26 and 33, Oregon Constitution, and Amendments I, IX, XIV, Section 1, of the United States Constitution.

13. The trial court erred in refusing to make an unqualified ruling that the claimed defenses of "merger," "estoppel" and "collateral estoppel" would not be ruled upon until after pretrial conference.

14. The trial court erred in stating in its ruling that "Plaintiff's rights are amply protected by the statutory right of appeal," since Mandamus is clearly the remedy afforded, appeal would be long and expensive, and going forward into pre-

trial conference and thence into trial would constitute a waiver of Plaintiff's right to change the place of trial for prejudice, under the law of Oregon.

Respectfully submitted,

ALBERTA HEFFRON,
Attorney for Plaintiff

/S/ WARREN CAMERON
WARREN CAMERON
Of Counsel for Plaintiff

FEDERAL CONSTITUTIONAL RIGHTS ASSERTED BY PETITIONER

The assertion of federal constitutional rights to Due Process and Equal Protection underlies the entire proceeding in both the trial and the appellate courts. None of the constitutional questions raised by Appellant were considered or ruled on by either Court.

In the trial court:

On page 2, lines 20-24 of Petitioner's Motion for Change of Venue, she asserts rights under Amendment XIV and refers to both state and federal constitutional rights.

In Petitioner's Memorandum of Law in Support of her Motion for Change of Venue, page 2, Point III she asserts federal constitutional rights under Amendment XIV, Section 1, in claiming her right to have a fair trial in a fair and impartial tribunal and cites Article VI, (2) as the Supreme Law of the Land.

In the Supreme Court of Oregon:

In Petitioner's Brief before the Supreme Court of Oregon, she refers to denials of constitutional rights (federal) in the titles to Points 1, 2, 8 and 13.

Petitioner argues the denial of Due Process in Assignment of Error #1 in pointing out the bias manifesting itself in the trial court procedure immediately prior to the trial date.

Petitioner argues the unconstitutionality of the last-minute pre-trial conference call on pages 21-25 and points out that in the trial court (Tr 11, lines 4-10) her counsel called the trial court's attention to the lack of Due Process. Amendments I, IX and XIV of the United States Constitution are particularly cited on page 25 in connection with the Due Process violations, and refers to

a federal case, Marcus v. Search Warrant, in arguing that the rule (6.00) itself on pre-trial conferences is void for vagueness under the United States decisions.

On page 39 of her Brief, Petitioner argues that the refusal of Respondent to answer questions in her attempts at discovery, violated Amendment XIV.

On page 48 of Petitioner's Brief, she argues the federal constitutional requirement of Due Process in urging that she is entitled to a fair trial in a fair place and therefore should have had a change of venue, citing In re Murchison, and Amendment XIV.

On Page 52, Petitioner cites In re Murchison in advocating that the Due Process aspects of the federal constitution are violated by a judge's judging his own prejudice in connection with a motion to change venue, and at page 54 cites Amendment XIV.

Petitioner refers to federal constitutional law and federal cases on page 59 of her Brief in urging her right to a fair trial in a fair place before a fair tribunal.

At page 62 of Petitioner's Brief before the Supreme Court of Oregon, she argues that, insofar as ORS 14.110 and 14.120 may appear to grant a trial judge "discretion" to grant or withhold a change of venue, it is unconstitutional under the Due Process clause of the federal constitution (citing Murchison) when a case has once been made out by the affidavits and motion.

At page 73 of her Brief, Petitioner, in claiming that judicial attainder had attached to her case, cites Murchison and Powell v. Alabama and at 74A asserts that the Fourteenth Amendment guarantees and protects her against such judicial attainder. She points out that she is being denied equal protection of the laws, as well, enumerating a long list of wrongs committed in the trial court.

APPENDIX J

AFFIDAVIT OF GOOD FAITH OF DOROTHY B. LEE

STATE OF OREGON
COUNTY OF MARION ss

I, Dorothy B. Lee, being duly sworn say:

That I am Petitioner in the original Petition for Mandamus and the Amended and Supplemental Petition for Writ of Mandamus in the foregoing cause; that such Petition arises out of a malpractice case for negligence against a Portland attorney, Ray G. Brown, who formerly represented me in certain cases in Marion County and Washington County and in certain other matters, namely, the obtaining of a fair property settlement.

That I make this Affidavit for the purpose of showing my good faith in moving for a change of venue from Multnomah County; that bias on the part of the Honorable William Dale is mentioned in my original Affidavit, but not all of the comments of Judge Dale are reported. That on October 1, 1971, I was present in the Court Room of Judge Dale at Portland and heard arguments on the original Motion to Strike and to remove from the case the claims of Ray G. Brown from his Answer, claiming that, in effect, because I entered into a settlement with Jason Lee on May 27, 1969 (which Jason Lee immediately repudiated and refused to perform), that this operated as a release of my former attorney, Ray G. Brown, for negligence in representing me in that case and another one, because of what is referred to as "merger" and "estoppel." That on that day, October 1, 1971, Judge Dale, in addition to the comments reported in my original Affidavit, said the following:

> "Im not going to try this case. I wouldn't want to try this case. I don't know of any judge that <u>would</u> want to try this case!"

That I believed at the time and still believe that such remark indicates extreme prejudice a-

gainst me and against my interest.

That Judge Dale made repeated unkind comments about the Amended Complaint and singled out my statement that Ray Brown, after the divorce, attempted to obtain a fee and claimed expenses amounting to nearly $13,000, which amounts to nearly one-third of the settlement; that when my counsel pointed out that Ray Brown was attempting to obtain a contingent fee and to do indirectly what he is forbidden to do under the code of legal ethics, Judge Dale said,

"Well, what's wrong with a contingent fee?"

That his assurance that he would not be trying the case led me to feel that even though he was obviously prejudiced, I could likely obtain a fair trial before some other judge, even though the Defendant in the case is an attorney and member of the bar, practicing before that Circuit Court and fraternizing with the Portland attorneys and other attorneys, since about 1947. Also, I was advised by my attorneys that moving to change the venue at that time out of Multnomah County would result in alienating the judges because of the need to state facts which support the motion for change of venue.

That I was also present in the Court Room of Judge John C. Beatty during nearly all of the Court Sessions on November 8th and November 9th, 1971, as was my daughter, Patricia Powell, who flew out from New York on Saturday, November 6th for the trial.

That my attorneys had prepared for a jury trial and had subpoenaed about nine witnesses; that I obligated myself for $304.00 to bring my daughter out from New York for the trial, as she had first-hand knowledge of the facts of my malpractice case against Brown; that I had personally assisted in assembling and classifying the great volume of documentary evidence in this case; that I had also spent a full day researching and making notes on the jury list; that I know of my own knowledge that my attorneys had thoroughly

prepared my case, had interviewed witnesses and obtained expert witnesses, had thoroughly researched the law and prepared memoranda thereon;

That it is absolutely essential that my case for malpractice be tried before a jury and not tried to a judge alone; that this is a point on which I am adamant because of unfair treatment I feel I have received at the hands of lawyers and judges in Oregon; that on November 5th, Friday, late, I learned that the case had been assigned for a "non-jury trial;" that this was contrary to the understanding I had from the comments of Judge Dale; that I felt that we could not go to trial before a judge without a jury, and after conferring with my attorneys on Saturday and again on Sunday, it was decided late on Sunday that we could not risk the submission of the case on a non-jury basis and that the fact that the case had been assigned for a "non-jury" trial and that the trial judge said merely that he would consider the matter on Monday, and had ordered my attorneys to go into a hasty pretrial conference on Monday morning at the time set for the regular trial, under the particular circumstances of this case, were facts indicating prejudice in the trial judge; that this feeling was confirmed during the sessions on November 8th and November 9th, 1971 in Judge Beatty's court;

That at the time of the argument on Monday morning, November 8th, 1971, Judge Beatty, although saying he thought we were probably entitled to a jury trial, did not say I would have a jury trial; it is my understanding that he said several times that he would make a ruling about the jury trial after the pretrial conference; he also said he would not make a ruling on whether the so-called "equitable" defenses of Defendant Brown would remain or would go out of the case, until after the pretrial conference, and he insisted that my attorneys go immediately into a pretrial conference, without a clear ruling on either matter. I felt and do now feel that the"equitable" defenses were entered by Mr. Brown's attorney to furnish an "escape hatch" to permit Defendant Brown to escape

liability in the event that the case went against him.

That Judge Beatty's treatment of my attorneys and my case was scolding and contemptuous; that he was punitive and arbitrary. That I was in good faith in moving to change the venue; that the decision to move to change the venue was my decision and was made after serious thought; that the records show that I could not have a fair and impartial trial in Multnomah County because of the prejudice there, at least in some measure due to the fact that the case involves a Portland attorney. That I believed until the 5th of November, late, that the case could and would be handled in a detached and impersonal manner and I therefore did not move earlier for a change to another county, even though I was aware of prejudice in the Presiding Judge. That I was advised by my attorneys that such a change should only be asked for where it is quite clear that a fair trial could not be had. That such is the case here.

/s/ DOROTHY B. LEE

SUBSCRIBED and sworn to before me this 18th day of November, 1971.

/s/ ALBERTA PALMER
NOTARY PUBLIC FOR OREGON
My commission expires:
June 18, 1972

NOTARIAL SEAL

APPENDIX K

MOTION FOR CHANGE OF VENUE

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

DOROTHY B. LEE, Plaintiff	)	CAUSE No. 359-386
-vs-	)	MOTION FOR CHANGE OF VENUE
RAY G. BROWN, Defendant	)	

COMES NOW Plaintiff, and based upon the Affidavits of Dorothy B. Lee and Alberta Heffron , marked "Exhibit A" and "Exhibit B", respectively, annexed hereto and by this reference incorporated into this Motion, moves this Honorable Court for a change of venue of this cause to Clackamas County for the reason that the Presiding Judge of Multnomah County, Judge William Dale, who has heard motions and arguments in this cause beginning on October 1, 1971, is so prejudiced against Party Plaintiff, Dorothy B. Lee personally, and his influence as presiding judge, and his ability and power to influence the other judges of the Circuit Court of Multnomah County, and to manage the conduct of this case so great, that Plaintiff cannot have a fair and impartial trial in Multnomah County.

That, in addition, he has selected the Honorable John Beatty for the trial of this cause and at the last hour, 4:00 o'clock P.M. on Friday, November 5, 1971, Plaintiff's Counsel was advised that said Judge Dale had conveyed his personal instructions to Judge Beatty that said trial be non-jury, contrary to the laws of this state, and contrary to Judge Dale's earlier assurances to Plaintiff and her counsel. That there has been created an atmosphere of "judicial attainder" inimical to the attaining of justice. That the law, as clearly enunciated by the Supreme Court of Oregon in King v. Jones, 92 Adv. Sh. 701, ___P2d ____(Apr. 21, 1971) Ruff v. Boltz, 252 Or 236, 238, 448 P2d 549 (1969), Carolina Casualty Insurance Company v. Oregon Automobile Insurance Company 242 Or 407, 413, 408 P2d 198 (1966), Carlton v. Carlton, 156 Or 33, 65 P2d

417 (1937), Carothers v. Carothers, 93 Adv. Sh. 45, ___P2d ____(Sept. 22, 1971), Western Baptist Mission v. Griggs, 248 Or 204, 233 P2d 252 (1967), Griffin v. City of Roseburg, 255 Or 103, 464 P2d 691 (1970), and Gaul v. Tourtellotte, 93 Adv. Sh 818, ____P2d____(Sept. 10, 1971), is being opposed and held for naught by the personal predilections and prepossessions of said Judge Dale, contrary to the judicial oath, contrary to the law and the Constitution of Oregon, and the canons of professional ethics. That this Court, acting through Judge Dale, and his influence as presiding Judge, has so abused its discretion as to amount to a denial of justice.

That no trial of this cause has been had nor has said trial been commenced or begun. That Plaintiff has acted with dispatch and diligence.

That Plaintiff has previously asked for and received no changes of venue in this cause, and that this particular change is requested from Multnomah to Clackamas County because Clackamas is the most convenient county where the cause may be tried and where there is least likely to be prejudice in this cause and most apt to be an atmosphere of neutrality. That said county is next to Multnomah County, where Defendant is located.

That this motion is made in good faith and not for the purposes of delay, but rather to the ends that justice may be done and Plaintiff be not denied the full panoply of her constitutional rights, including the constitutionally given right to jury trial. That there be no interference with the full civil rights of Plaintiff by said Court, or opposing counsel in the person of John R. Sidman, or Defendant Ray G. Brown, in violation of the full civil rights of Plaintiffand the protection given thereby under the federal statutes and the state and federal constitutions, particularly Article I, Sections 10, 17 and 33 of the Constitution of Oregon and Amendment XIV of the United States Constitution.

That Plaintiff, in support of this Motion for Change of Venue, will rely upon ORS 14.110 and 14.120 and authorities cited in the accompanying Memoran-

dum, plus any additional material to be submitted at time of oral argument.

That the request for Change of Venue is made with diligence and dispatch immediately following knowledge of the actual prejudice set forth; that it is a matter of right under the recent case of Rose v. Etling, 255 Or 395, 467 P2d 633 (1970) and additional authorities to be submitted at the time of argument.

That the jurisdiction of this Court, under ORS 14.110, the case law of Oregon and the construction of almost identical statutes in neighboring states, stops or is suspended immediately upon the moment that this motion is filed.

Respectfully submitted,

ALBERTA HEFFRON
Attorney for the Plaintiff
145 Wilson, South, Salem,
Oregon, 97302
Telephone 364-7702

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH
AT LAW

DOROTHY B. LEE, Plaintiff	)	No. 359-386
	)	EXHIBIT "A"
-vs-	)	AFFIDAVIT OF
RAY G. BROWN, Defendant	)	DOROTHY B. LEE

STATE OF OREGON) SS
COUNTY OF MARION)

I, Dorothy B. Lee, being sworn on oath say:

That I am Plaintiff in the above entitled cause; that this cause is an action at law for damages for negligence (malpractice) against Ray G. Brown, a Portland attorney, practicing in Multnomah County;

That I cannot have a fair trial in Multnomah County because of the prejudice of the Presiding Judge, William Dale, and his influence over and control of the Circuit Court Judges of Multnomah County; that this fact did not become conclusively apparent until Friday, November 5, 1971, late in the afternoon.

That I was present in the Court Room of Presiding Judge William Dale on October 1, 1971; that I heard arguments of my counsel and the Defendant's counsel on that day with regard to certain claims of the Defendant's counsel of merger and estoppel as defenses, and that it appeared to me that Presiding Judge Dale had already made up his mind and was prejudiced against me and was determined to help the Defendant. That he made caustic and unjustified comments about my case against Mr. Brown; that he made nasty remarks about the pleadings in my case, and that he said, in effect, that when I entered into a settlement agreement with Jason Lee on May 27, 1969 in the divorce, that that released Defendant Brown.

That I was present and heard my attorney tell Judge Dale that she wanted the record to show that we wished to preserve my right to a jury trial; that in my presence Judge Dale told her unequivocally that we would have a jury trial. That Judge

Dale on that day also said that he would not be trying the case. As a consequence, although I knew from his actions that day that I would never have a fair trial if he tried the case, I did not press my attorney for a change of venue because I felt that another judge would, likely, be fair.

That I learned late on Friday, November 5, 1971, that Judge Dale had not kept his word as to jury trial, but had assigned the case to Judge Beatty for trial without a jury. That Defendant is afraid to have a jury hear the facts of his handling of my case and my legal business.

That Judge Dale is prejudiced against me personally as a party; that his influence and power as presiding judge over the judges of Multnomah County, and the handling and management of this case is so great that I cannot have a fair trial in Multnomah County; that I have not previously asked for change of venue; that I am in good faith in asking for a change of venue, and respectfully request that the venue of this case be changed to another county, namely: to Clackamas County.

That I do not ask for change of venue for purposes of delay. That I have already become obligated for witness, service fees and mileage and for the expense of bringing a witness to Oregon from New York. That it is better, however, to take whatever delay may be entailed and have a full and fair trial in an atmosphere of neutrality, than to have an unfair trial and unfair manipulation of the Court by the Defendant in this case.

That the calling of a pre-trial conference at the last hour before trial is calculated and prejudicial. It gives no reasonable time to prepare papers for same, or proper consideration and reflection. That such calling is a denial of due process and the right to a fair and complete trial, with absence of judicial compulsion and attainder and in an atmosphere of judicial calm, not prejudice.

/S/ DOROTHY B. LEE

SUBSCRIBED and sworn to before me this 7th day of November, 1971.

/S/ ALBERTA PALMER

NOTARIAL SEAL

Notary Public for Oregon
My commission expires:
June 18, 1972

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

EXHIBIT B

DOROTHY B. LEE, Plaintiff) Case No. 359-386

-vs-) AFFIDAVIT OF ALBERTA HEFFRON

RAY G. BROWN, Defendant)

STATE OF OREGON) SS
COUNTY OF MARION)

I, Alberta Heffron, being duly sworn on oath say:

That I am an attorney at law and am the attorney of record for Plaintiff in this cause.

That the Complaint in the above cause was filed in June of 1970; that thereafter an Amended Complaint was filed, and an Answer containing a general denial except for some limited admissions. That the case was set for trial. That Defendant requested a continuance; that thereafter the cause was re-set for trial, once at Plaintiff's request and again on request of Defendant's newly employed counsel, John R. Sidman, who represented to the Court that he wished to file additional matters in a new Answer.

Thereafter Defendant, Without leave of Court, filed an Amended Answer; Plaintiff moved to strike, and the Amended Answer was stricken.

Thereafter, in early June, 1971, Defendant filed a Second Amended Answer purporting to set forth a number of claimed Affirmative Defenses, consisting of merger, collateral estoppel and equitable estoppel, and materially departed from his original position in his Answer.

To this Second Amended Answer, Plaintiff filed a series of Motions and in the Alternative, Demurrers.

That the cause had been set for trial on August 9th, 1971. We were not at issue on the pleadings and had not argued nor had a ruling on the Plaintiff's motions and demurrers to the affirmative defenses. On Friday, August 6th, I received a telephone call from the newly appointed presiding judge, Hon. William Dale, advising me that the cause would go on for trial on August 9th. I pointed out that

we were not at issue; that we wanted a jury trial, and he told me it should be reset then, for a jury trial. He also said, "I will not postpone this case again. It is going to be tried." I had no objections to going to trial as soon as issues could be determined. Later, I was assigned a date of October 1, 1971 as time for argument of my Motions and Demurrer.

That on October 1, 1971, Affiant, for the first time, appeared before Judge Dale for argument on her Motions and Demurrers. That at that time I pointed out that the cases of Oregon, especially the case of Bahler v. Fletcher, 91 Adv. Sh. 21, ___Or ___, 474 P2d 329 (1970), which had been cited by Defendant, set out the rules for collateral estoppel and that the doctrine plainly does not apply to the case at bar. That Judge Dale had plainly already made up his mind and would not listen to my argument. He refused to remove the issues of Defendant's claimed equitable defenses of merger, collateral estoppel and equitable estoppel. Additional research was then done by me, and a Motion to Reconsider, Motions to Strike and Alternative Demurrer, with a fairly complete Memorandum of Authorities, was submitted within approximately ten days of the filing of the Third Amended Answer, which again set up the claimed defenses of merger, collateral and equitable estoppel, this time all in one Affirmative Defense.

The cause, under directions of Judge Dale, had been set for trial on November 8, 1971.

That on October 1, 1971 at the argument, after ruling by Judge Dale against me, I asked specifically that he advise me whether Plaintiff would have her jury trial and expressly requested that the record show that Plaintiff desired all her rights under the State and Federal constitutions, to jury trial, preserved. At that time, Judge Dale assured me that Plaintiff would have a jury trial. Judge Dale had earlier, at the beginning of the argument, announced that he would not be trying the case. Plaintiff, herself, was in the court room on that day. That on that day, Judge Dale was extremely caustic about Plaintiff's pleadings; that he had, in effect, plainly pre-judged the case, and made it clear by statements that he was hostile to and

:ejudiced against Plaintiff and her cause, and favor-
i the Defendant.

That the Defendant in this case is an attorney,
:acticing in Portland before the courts there for
iny years. That Plaintiff has, however, until the
irst of October when she began to have doubts, felt
ie could obtain a fair trial in the Circuit Court
f Multnomah County. That Plaintiff, was, however,
e-assured by Judge Dale's announcement that he would
ot be trying the case and that Plaintiff would have
er jury trial.

That preparations have been made for jury trial.
iat some seven or eight witnesses have been placed
nder subpoena and witness fees, mileage and service
ees have been advanced, and a witness flown out from
ew York.

That on November 1, 1971, argument again was
ad on the Plaintiff's motions to reconsider, and
er Motions to strike and alternative Demurrer,
nd to remove the claimed equitable defenses of
erger and estoppel from Defendant's Third Amended
nswer. That a copy of Plaintiff's Memorandum of
uthorities is annexed hereto and by this reference
ncorporated into this Affidavit as though fully set
orth.*

That at the argument I expressly pointed out
ome recent cases, one of which, King v. Jones, 92
dv. Sh. 701, ___P2d ___(Apr. 21, 1971) was a mal-
:actice case out of Judge Dale's own court, in
nich he was reversed; it was a case involving the
ery principles involved in the case at bar. That
nen I attempted to quote to Judge Dale the material
uoted on page 3 of my Memorandum, attached, from
:. Justice Tongue's opinion, Judge Dale said sub-
:antially this:

> "I know what the Supreme Court said. I don't understand it. I think the Court is wrong and I am not going to follow it."

That he then ruled against my motions and al-
ernative demurrer. It was apparent that Judge
ale had made up his mind and would not consider

*This memorandum has been omitted from this copy. It
s part of the Transcript which is before this Court,
s part of the Motion for Change of Venue.

any authority and that he was openly prejudiced against the Plaintiff and her cause.

That Defendant's machinations in attempting to inject so-called equitable defenses into this malpractice case is a transparent attempt by Defendant to deprive Plaintiff of her right to jury trial and trial by a fair and impartial tribunal. That it is a ruse. That the claimed defenses under the general law of the United States and under the cases of Oregon, are patently inapplicable. That I had, however, been reassured by Judge Dale's announcement that he would not be trying the case and that the Plaintiff's right to jury trial was preserved.

That, nevertheless, at approximately 4 P.M. on Friday, November 5, 1971, I received a telephone call from Judge Beatty. That he advised me that the case had been assigned to him, and that he had decided the trial would not begin until 2:00 P.M. on Monday and that he wished the attorneys to come in at 9:00 A.M. on Monday, November 8th, 1971, for a pretrial conference "to iron out the pleadings and narrow the issues." That the issues in this case are entirely too complex to be resolved in a morning's conference, and that if a pretrial conference is to be held, sufficient time should be allowed to consider all of the aspects and including the submission and drafting of the proper pretrial documents.

That immediately after this conversation, I called Judge Beatty back to be reassured that jury trial would be preserved for Plaintiff on the issues of fact. That Judge Beatty then advised me that the case had been assigned to him <u>for a non-jury trial,</u> by Judge Dale. That at that moment, it became apparent that the prejudice of Judge Dale against the Plaintiff had erupted into a "power play' to force the Plaintiff into a non-jury trial, contrary to provisions of the state and federal constitutions and the statutes of Oregon.

Not until that moment did I realize that there was such extreme prejudice against the Plaintiff that she simply cannot have a fair trial in Multnomah County; that Judge Dale is so prejudiced against her and her interests and cause and that

cause of the influence and control by him as pre-
ding judge, no Multnomah County judge can be fair
this case and that prejudice against the Plaintiff
d her cause and interests permeates the entire Mult-
mah County Circuit Court.

That there has been a calculated manipulation
the Court by the Defendant and his counsel, in the
rson of John R. Sidman, in this case, to deprive
e Plaintiff of her civil rights and her right to
ir and impartial jury trial in a fair and impartial
ribunal.*

That no trial has been had nor commenced. That
prior change of venue has been asked nor given.

That the Motion for change of venue accompany-
g this Affidavit, as has already been shown, is
t made for purposes of delay, but is made in good
ith and to fully protect Plaintiff in the state
d federal rights to which she is entitled and
resently being denied.

/S/ ALBERTA HEFFRON

SUBSCRIBED and sworn to before me this 7th day
November, 1971.

/S/ ALBERTA PALMER

NOTARIAL SEAL

NOTARY PUBLIC FOR OREGON
My commission expires:
June 18, 1972

Under Oregon law, ORS 16.460 (2) " When..equitable
tter is interposed, the proceedings at law shall
stayed, and the case shall thereafter proceed,
til the determination of the issues thus raised,
a suit in equity by which the proceedings at
w may be perpetually enjoined or allowed to pro-
ed in accordance with the final decree....."

Appendix L

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

DOROTHY B. LEE, Plaintiff,	)	No. 359-386
vs.	)	
RAY G. BROWN, Defendant.	)	ORDER AND JUDGMENT OF DISMISSAL

Plaintiff in open court through her attorneys of record, having refused to proceed with trial in this department upon the date, time and place assigned for trial, and having refused to request the Presiding Judge for reassignment to another trial department, despite assurance that such assignment would be made upon request, and the Court having delivered its opinion and having made findings;

Under ORS 18.230, under ORS 18.260, upon motion by defendant, and under the Court's common law power on its own motion to dismiss a case where a party refused to proceed with trial; IT IS HEREBY ORDERED, ADJUDGED and DECREED that the above cause be, and the same is, hereby dismissed, and that judgment be entered against plaintiff and in favor of defendant and that defendant have and recover his costs taxed at $_____.

DATED at Portland, Oregon, this 17th day of November, 1971. Nunc Pro Tunc November 9, 1971.

/s/ John P. Beatty Jr.
CIRCUIT JUDGE

APPENDIX M

MULTNOMAH COUNTY CALENDAR CLERK'S MASTER

FILE CARD ON THIS CAUSE

(Small card)
Form Cir Ct 7 Sp 647

Calendar Clerk's Master File

Title of Cause

359-386

Plaintiff	vs.	Defendant
Dorothy B. Lee		Ray G. Brown

Name of Attorneys

Alberta Heffron Salem, Oregon, 97302 145 Wilson, South	John R. Sidman Portland Bldg. Brown & Burt Salem, Oregon Capitol Tower 97301

Court or Jury JURY xxxx Date filed 6/15/70
5 Days ct.

D D 1
/Order dismissal/ 11/17/71 Beatty

359-386 Nov. 9 Dismissed Mon 2:00

Appendix N

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

DOROTHY B. LEE,

Plaintiff,

v.

MYRTLE LEE,

Defendant.

No. 339-645

ORDER

This matter having come on before the Honorable Lean F. Bryson on January 6, 1969, upon the motion of defendant for change of venue of the above-entitled case to Washington County, and plaintiff appearing by and through Kay G. Brown, her attorney; and defendant appearing by and through Dwight L. Schwab (of Hutchinson, Schwab & Burdick), one of her attorneys; and the court having heard testimony and argument from both parties in support of their respective positions, and being fully advised:

IT IS HEREBY ORDERED that said motion for change of venue of the above-entitled case to Washington County be and the same hereby is allowed.

DATED this ____ day of January, 1969.

Circuit Judge

HUTCHINSON, SCHWAB & BURDICK
1500 OREGON BUILDING, PORTLAND, OREGON 97204
TELEPHONE 223-7011 AREA CODE 503

Appendix O

Supreme Court of Oregon - Rules of Court

Rule 5.60

WRITS OF ORIGINAL JURISDICTION

All applications for writs of original jurisdiction must be served upon the adverse party together with a typewritten or printed memorandum of the points involved and authorities relied upon. In addition to such matters as may be required by statute, every petition shall state the reasons why such application was not made to the circuit court. Such application and memorandum, accompanied by eight copies thereof, shall be filed with the court. Except in cases in which the court shall assume jurisdiction upon presentation of the application, the adverse party may, within five days from date of service thereof, serve and file a memorandum brief together with eight copies in opposition to the application for the writ. The application will then be considered by the court without oral argument unless otherwise ordered. If the court assumes original jurisdiction, briefs shall be prepared in conformity with Rule 2.05 and shall be filed within the time provided by Rule 2.10 (3). The original brief with proof of service endorsed thereon, together with 25 copies, shall be delivered to the clerk.

I hereby certify that I served the foregoing Petition for Writ of Certiorari (corrected to replace original) on John R. Sidman, attorney for Respondent, on the 25th day of June, 1973, by mailing to him three (3) true and correct copies thereof, certified by me as such. I further certify that said copies were placed in an envelope addressed to the said attorney at Portland Building, Portland, Oregon, 97204, which is his regular office address; said envelope was then sealed and deposited in the United States post office at Salem, Oregon on the day last above mentioned, with regular postage thereon fully paid.

All parties required to be served have been served.

Alberta E. Heffron

ALBERTA E. HEFFRON
Attorney for Petitioner